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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PETER A. CROSBY,

Petitioner,

V.

STATE OF HAWAII; STATE OF HAWAII DEPARTMENT OF BUDGET & FINANCE; STATE OF HAWAII DEPARTMENT OF ACCOUNTING & GENERAL SERVICES; YUKIO TAKEMOTO, Director of State of Hawaii Department of Budget & Finance; RUSSELL NAGATA, State Comptroller; DOES 1-50, inclusive

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Hawaii Supreme Court err as a matter of law when it concluded that there was no causal nexus between Petitioner PETER CROSBY's complaints about illegality in the contractor selection process and his removal from supervising a review of a state-sponsored tourism project?

2. Did the Hawaii Supreme Court err as a matter of law when it misapplied the Pickering balance?

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I. OPINION OF THE SUPREME COURT OF THE STATE OF HAWAII

The July 18, 1994 opinion of the Supreme Court of the State of Hawaii is reported at 76 Hawaii 332, 876 P.2d 1300 (1994) and appears in Appendix A.

II. JURISDICTION

The opinion of the Supreme Court of the State of Hawaii was filed on July 18, 1994. Judgment was entered on August 4, 1994 -- Appendix C. The Petitioner PETER CROSBY (Plaintiff-Appellant below) has filed a timely Petition for Writ of Certiorari. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257.

III. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibitng the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peacably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

IV. STATEMENT OF THE CASE

The Petitioner, Peter A. Crosby, ("Petitioner" or "Mr. Crosby") brought this action against the State of Hawaii ("Respondent" or "State") and its agents for violating his right to free speech under the United States Constitution. The State of Hawaii removed him from his position of supervising a State-sponsored tourism study

after he raised concerns regarding the legality of the consultant selection procedures and conflicts of interest of the consultants that submitted proposals.

Mr. Crosby's complaint was tried in a non-jury trial in December, 1990, in the First Circuit Court, ("Circuit Court" or "trial court") State of Hawaii. The Circuit Court entered its Findings of Fact and Conclusions of Law on March 5, 1992 -- Appendix C, finding that the State of Hawaii did not violate Mr. Crosby's right to free speech under the United States Constitution. Mr. Crosby filed a post-trial motion seeking to alter the judgment. This motion was considered and denied by the trial court.

What follows is a summary of the findings of fact by the Circuit Court. (Quoted portions are the actual findings entered by the trial court.) These facts or findings were not appealed by either party.

1. Petitioner Peter Crosby is employed by the Department of Budget and Finance of the State of Hawaii as a resource allocation systems analyst. (Finding of Fact 7.) Appendix B at 3.

2. On July 17, 1988, Mr. Crosby was assigned the task of preparing project specifications for a comprehensive management study of the State's tourism program and the Hawaii Visitors Bureau. (Findings of Fact 8 and 9.) Appendix B at 3-6.

3. "After conducting extensive research erelating [sic] to tourism and program evaluations, and pursuant to HRS Chapter 103, the State's procurement code, Crosby recommended to his supervisor, [Dennis] Goda, that a competitive method of selection be used to select the consultant." (Finding of Fact 12.) Appendix B at 7.

4. On November 3, 1988, Dennis Goda transmitted Mr. Crosby's recommendations to Dennis Goda's supervisor, Robert Takushi, and recommended that Takushi approve Mr. Crosby's recommendations contained therein "including the recommendation to go by way of advertisement [for competitive bidding]." (Finding of Fact 20.) Appendix B at 9.

5. HRS Chapter 103, expenditure of public money and public contracts, requires that all public monies that are expended in excess of fifteen thousand dollars ($15,000) are to be made "under contract let after public advertisement for sealed tenders, in the manner provided by law." HRS Section 103-22.

6. "The Comptroller has not promulgated any rules or requirements to implement Section 103-22, HRS." (Finding of Fact 91.) Appendix B at 36. Defendant Russell Nagata, the State comptroller,

testified that HRS Chapter 103 creates a presumption of competitive bidding unless there is a specific exemption given. T. 12-3-90 at 29-1 through 29-5. (References to "T.(date)" refer to the trial transcripts in this case.)

7. The State of Hawaii has several ad hoc exceptions to the bidding requirements of HRS Chapter 103, including contracts which do not admit of competition (includes all consultant contracts) and contract services which are available from only one supplier or contractor (sole source contracts). Plaintiff's exhibit 17: State of Hawaii Circular 1977-3, Appendix D.

8. "Takushi considered the recommendation of both Crosby and Goda and decided that the tourism project should proceed in a non-bid fashion." (Finding of Fact 21.) Appendix B at 9.

9. "Takushi informed Goda that the [proposal] would be sent only to the largest accounting firms and directed Goda to do so." (Finding of Fact 24.) Appendix B at 10.

10. Peter Crosby was told by Goda of Takushi's decision and because Mr. Crosby believed that sending the proposal only to large accounting firms "was in violation of Chapter 103, [Mr. Crosby] declined the invitation to select the firms, and asked Goda to make the selection." (Finding of Fact 25.) Appendix B at 10.

11. "Goda chose eight firms to which the [proposal] would be sent from the Yellow Pages, and directed Crosby to send the [proposal] to those firms." (Finding of Fact 26.) Appendix B at 11.

12. Thereafter, Crosby wrote a memorandum to Goda transmitting the letters of invitation to the eight firms and urging

that the department take advantage of the benefits of open competition. This suggestion was rejected by Goda on November 12, 1988. (Findings of Fact 28 and 29.) Appendix B at 11-12.

13. On November 16, 1988, Crosby wrote a memorandum requesting the Director of Finance to obtain an attorney general's opinion for the propriety of the selection process to go non-bid. (Finding of Fact 35.) Appendix B at 15.

14. Thereafter, "Crosby continued to work on the project and coordinated an informational meeting attended by representatives of four of the eight accounting firms to which the [proposal] was sent." (Finding of Fact 37.) Appendix B at 16.

15. Goda asked Crosby to evaluate the two proposals which were submitted and Crosby stated that "both companies had

apparent conflicts of interest since they had previously done consultant work for the Hawaii Visitors Bureau and effectively would be evaluating, in part, their own work." (Finding of Fact 40.) Appendix B at 16-17.

16. On February 23, 1989, Crosby was requested to prepare a draft of the contract for the project and forward it to Goda. (Finding of Fact 44.) Appendix B at 18-19.

17. On March 6, 1989, Deputy Attorney General Diane Erickson wrote a memorandum to Crosby and asked whether there was appropriate sole source or consultant contract approval for the contract to go non-bid. (Finding of Fact 45.) Appendix B at 19-20.

18. On March 8, 1989, Crosby met with Erickson and "explained why he believed the project was required by law to go by way of bid." (Finding of Fact 48.) Appendix B at 21.

19. On March 14, 1989, Erickson explained to Crosby that she believed that the Director of Finance had the discretion to decide that the project did not have to go out for bid. (Finding of Fact 49.) [1] Appendix B at 22-23.

20. "Erickson testified that if sole source approval or consultant contract approval was not obtained or pending, it would not be appropriate to include that language in the contract. As of April 19, 1989, Takushi testified that neither sole source approval nor consultant contract approval had been obtained nor was it pending, although Takushi testified that it was his intention to obtain these approvals." (Finding of Fact 80.) Appendix B at 33-34.

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[1] The question of whether the project had to be bid or non-bid was not litigated in the trial court.

21. Crosby received the draft agreement back from Erickson's office on April 7, 1989, which again asked Crosby whether sole source approval had been obtained, or if the contract was a consultant contract. "Because Crosby believed that sole source approval had not yet been obtained and believing that this was a consultant contract that did admit of competition, Crosby believed that Erickson was advising him in her April 7, 1989 memorandum to falsify the documents in his files. (Finding of Fact 53.) Appendix B at 24.

22. "Crosby met with Erickson on April 11, 1989 to discuss her memorandum. Erickson told Crosby that the Attorney General has not issued any opinion that addresses the competitiveness for consultant contracts. Crosby advised Erickson that he was leaving the language in the draft

contract unchanged, and that he would forward her memorandum to Goda along with the draft contract." (Finding of Fact 54.) Appendix B at 24-25.

23. Crosby refused to insert the language suggested by Erickson in her memorandum of March 6, 1989. He "declined to do so due to his concern that to do so would be to participate in 'illegality.'" (Finding of Fact 51.) Appendix B at 23.

24. "After meeting with Crosby on April 11, 1989, Erickson went to Takushi's office and informed Takushi that Crosby had concerns over the method by which the project consultant was selected." (Finding of Fact 58.) Appendix B at 26.

25. "After his meeting with Erickson, Takushi went to Goda to discuss Crosby's concerns. Takushi believed that the project was getting bogged down and was being delayed by Crosby's concerns, that Crosby

was losing his objectivity because of his concerns, and felt that there was "bad blood" between Goda and Crosby on the basis of a discussion that he held with Crosby three years earlier." (Finding of Fact 64.) Appendix B at 28-29.

26. "Takushi decided to remove the project from Crosby because the project was bogged down, not moving forward, because Goda showed his frustration in dealing with Crosby's concerns, and because Plaintiff appeared to be losing his objectivity." (Finding of Fact 70.) Appendix B at 31.

27. "The personnel decision to reassign the tourism project from Crosby to another [employee] was based on Takushi's concern that the project move forward, and his sense that the Department would function more efficiently if he was able to unhook that particular project from the Plaintiff." (Finding of Fact 74.) Appendix B at 32.

28. "Up to April 18, 1989, the State of Hawaii, through its designated representative, could not identify any delays whatsoever that Crosby caused to the project. The State of Hawaii, through its designated representative, testified that it was Crosby's obligation to raise his concerns concerning the method of selecting the contractor and apparent conflicts of interest with his supervisors. From the time period July, 1988 - April 18, 1989, Crosby was never informed, in writing or otherwise, that his actions were delaying the project." (Finding of Fact 65.) Appendix B at 29.

29. "Though Takushi believed that Crosby truly felt that he was justified in raising the issues, Takushi felt that this resulted in the project being bogged down." (Finding of Fact 69.) Appendix B at 30-31.

30. "Crosby's manner of stating his concerns to his superiors was not disruptive to the operations of the Department of Budget and Finance." (Finding of Fact 71.) Appendix B at 31.

31. The designated contractor for the project never signed the offered contract because of a telephone call from Takushi which was made before the end of April, 1989. Depositions of Dale Saito, 11-6 through 13-1, and Carolyn Worth at 12-3 through 12-19.

Based upon the above findings of fact, the trial court ruled that:

> There was no causal nexus between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project at issue. (Conclusion of Law 3.)

Appendix B at 39.

The Hawaii Supreme Court affirmed the trial court's conclusion that there was no

causal connection between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project. Crosby v. State, 76 Hawaii at 344, 876 P.2d at 1312, Appendix A at 44. ("In other words, the record supports the conclusion that Crosby's voiced concerns about the bid/non-bid issue were not a 'motivating factor' in the State's decision to remove him from the project.")

V. FEDERAL QUESTIONS RAISED BELOW

Petitioner's United States Constitution First Amendment claim was raised in the Circuit Court of the First Circuit State of Hawaii through Petitioner's Second Amended Verified Complaint filed on August 1, 1990. R. 2-263. (References to "R. (volume)-(page)" refer to the Record on Appeal before the Hawaii Supreme Court.)

The Circuit Court of the First Circuit ruled with respect to Petitioner's First Amendment claim that:

> Further, there was no causal nexus between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project at issue.

Conclusion of Law, paragraph 3, Appendix B at 39. Plaintiff filed a timely appeal of that ruling to the Hawaii Supreme Court on April 13, 1992. R. 4-308.

The Hawaii Supreme Court affirmed the trial court ruling in Crosby v. State, 76 Hawaii 332, 344, 876 P.2d 1300, 1312, Appendix A at 44:

> In other words, the record supports the conclusion that Crosby's voiced concerns over the bid/non-bid issue were not a "motivating factor" in the State's decision to remove him from the project.

VI. ARGUMENT

This Court should grant this Petition to correct an anomaly by the Hawaii Supreme

Court in the well-settled rules applied to the free speech activities of public employees.

A. **Reasons for Granting Writ**

This Petition for Writ of Certiorari should be granted for the reasons stated in Supreme Court Rule 10.1(c). First, the Hawaii Supreme Court erred as a matter of law in concluding that Petitioner Peter Crosby's complaints about illegality in contractor selection were not causally related to his removal from supervising a review of a state sponsored tourism project. In so ruling, the Hawaii Supreme Court ignored the explicit factual findings of the trial court and unequivocal evidence on the record that support a causal connection between Mr. Crosby's exercise of his free speech rights and the disciplinary action taken against him.

Second, the decision of the Supreme Court of the State of Hawaii squarely conflicts with the decision of this Court in Mt. Healthy v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed. 2d 471 (1977). The Hawaii Supreme Court ignored the Mt. Healthy standard for determining when a public employee's speech is entitled to constitutional protection. Instead of shifting the burden to the State of Hawaii to show that it would have removed Mr. Crosby from supervising the tourism project in the absence of his protected speech, the Hawaii Supreme Court improperly relied upon this Court's recent decision in Waters v. Churchill, ___ U.S. ____, 114 S. Ct. 1878, 62 U.S.L.W. 4397, number 92-1450 (May 31, 1994) and erroneously looked to the subjective belief of the State's representative, Waters, 114 S.Ct. at 1889,

rather than requiring the State to prove and meet its burden under Mt. Healthy.

Lastly, the Hawaii Supreme Court erred as a matter of law in misapplying the balance required under Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The Hawaii court in effect ignored the criteria to be applied in balancing the government's interest in its efficient operation against the public employees' right to free speech.

Prior to Waters, the standard for evaluating claims by public employees that they have been improperly disciplined for exercising their right to free speech has been articulated by this Court in five cases: Connick v. Myers, 461 U.S. 138, 103 S. Ct. 164, 75 L.Ed. 2d 708 (1983); Mt. Healthy v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed. 2d 471 (1977); Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct.

1731, 20 L.Ed. 2d 811 (1968); Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L.Ed.2d 315 (1987); and Givan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

The legal standard articulated by the Court in the above four cases has remained virtually unchanged for the past seven years. The standard requires that there be three steps followed in determining whether there is an actionable claim for the infringement of a public employee's First Amendment rights. [2]

---

[2] The Hawaii Supreme Court described the standard as follows:

> The law in this area is well-settled. A public employee claiming that an employer's action violates the speech clause of the First Amendment bears the initial burden of making a prima facie showing that 1) the conduct was constitutionally protected,

First, the court must determine if the employee's speech was constitutionally protected, namely, that his speech was on matters of public concern, Connick, 461 U.S. at 147-148, and that, on balance, his interest in commenting on matters of public concern outweighs the State's interest in the "effective and efficient fulfillment of its responsibilities to the public." Connick, 461 U.S. at 150.

---

and 2) the conduct was a "substantial" or "motivating" factor in the government's decision to take the challenged action. Mt. Healthy v. Doyle, 429 U.S. 274 (1977). Once that showing is made, **the burden shift to the State to show by a preponderance of the evidence that it would have reached the same decision absent the protected conduct. Id.**

Crosby v. State, 76 Hawaii at 343, 876 P.2d at 1311, Appendix A at 37 (emphasis added).

Second, if the employee did speak out on a matter of public concern, the employee must show that the protected expression was a substantial or motivating factor in the adverse employment decision. Third, if the plaintiff meets this test, the defendant governmental entity must then show:

> By a preponderance of the evidence that [it] would have reached the same decision . . . even in the absence of the protected conduct.

Mt. Healthy, 429 U.S. at 287, 97 S. Ct. at 576 and Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989).

B. Standard of Review

In evaluating an employee's First Amendment claim, this Court must make "an independent constitutional judgment on the facts of the case." Connick, 461 U.S. at 150 note 10, 103 S. Ct. at 1692 note 10.

Thus, these determinations are always subject to de novo review. See generally, Bose Corporation v. Consumers' Union of the United States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L.Ed. 2d 502 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free speech.'")

C. **The Hawaii Supreme Court Erred as a Matter of Law in Concluding that Petitioner Peter Crosby's Complaints About Illegality in Contractor Selection Were Not Causally Related to His Removal From Supervising a Review of a State Sponsored Tourism Project**

Although the Hawaii Supreme Court concluded that Peter Crosby's voiced concerns about contractor selection and conflicts of interest were not "a motivating

factor" in the State's decision to remove him from the project, the Supreme Court erred in ignoring the findings of the trial court and unequivocal evidence on the record that there was a causal connection. Mr. Takushi admitted that Mr. Crosby was removed because of the concerns that he expressed. T. 12/5/90 at 128. Mr. Goda admitted that Mr. Takushi removed Mr. Crosby because of the concerns that he expressed. T. 12/5/90 at 58-60. Mr. Crosby testified that he was informed that he was removed because of the views that he expressed. T. 12/4/90 at 38-39. In short, the testimony is unequivocal that Mr. Crosby was removed from the project because of the statements that he made. In fact, Defendants' attorneys themselves have admitted that Mr. Crosby was removed from the project because of the expression of his First Amendment rights:

> Because of Crosby's continued concerns regarding the project, Goda assigned Al Chun to the ministerial task of overseeing the contract.

R. 1-225: Defendants' Responsive Pretrial Statement at 2-3.

The State further admitted in response to Plaintiff's motion for summary judgment that

> The motivating factors behind his replacement were his continuous complaints, his loss of objectivity and the fact that the contract was behind schedule.

R. 3-339: Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment at 4.

As shown below, an analysis of the trial court's Findings of Fact, paragraphs 70 and 74, confirm that there was a causal connection between Peter Crosby's expressed concerns about contract illegality and his removal from the project.

In its Finding of Fact 70, the trial court concluded that the project was removed from Crosby because it was "bogged

down [and] not moving forward", that Dennis Goda had "showed his frustrations in dealing with Crosby's concerns" and because Peter Crosby appeared "to be losing his objectivity". Finding of Fact 70, Appendix B at 31. The trial court also concluded that the decision to reassign the project was based upon Mr. Takushi's "concern that the project move forward" and that the Department would "function more efficiently". Finding of Fact 74, Appendix B at 32.

A review of these trial court findings shows that these findings support the causal connection between Mr. Crosby's expressed concerns and his removal from the project.

As a preliminary matter, any reliance by the Hawaii Supreme Court on project delay or department inefficiency has no basis in fact because

> Up to April 18, 1989, the State of Hawaii, through its designated representative, could not identify any delays whatsoever that Crosby caused to the project.

Finding of Fact 65, Appendix B at 29, and

> Crosby's manner of stating his concerns to his superiors was not disruptive to the operations of the Department of Budget and Finance.

Finding of Fact 71, Appendix B at 31.

Thus, the only reasons relied upon by the Hawaii Supreme Court for Mr. Crosby's removal were (1) that Mr. Crosby lacked objectivity and (2) that Mr. Goda was frustrated.

However, both of these reasons related to the statements made only in the context of this project by Mr. Crosby:

> Q. And you believed that Mr. Crosby in raising these two concerns resulted in what you term a lack of objectivity?
>
> A. Yes.

T. 12/5/90 at 25-26: Testimony of Dennis Goda.

> Q. The tension had to do with Mr. Crosby's concern, correct?
>
> A. Both. Dennis' concern. Dennis was just as frustrated by the whole process. I have got two personnel that I got to worry about.
>
> Q. The concerns you are referring to are Mr. Crosby's concerns?
>
> [objection overruled]
>
> A. The concerns that we have revolved about what Peter was concerned about.

T. 12/5/90 at 146-147: Testimony of Robert Takushi.

In the absence of his stated concerns, Mr. Crosby could not be described as lacking objectivity nor would Mr. Goda allegedly suffer frustrations; therefore, there would be no basis for Mr. Takushi's perception that the project was "bogged down." Clearly, it is implausible or

illogical to believe that Mr. Crosby's concerns were not a substantial or motivating factor in his removal.

It is absolutely clear on the record that Mr. Crosby's supervisors, Dennis Goda and Robert Takushi, admitted that Mr. Crosby was removed from the project, in part, because of his expressed opinions:

> Q. You would agree, would you not, that Mr. Crosby was removed from the project in part because of his concerns relating to the bidding aspect of the project?
>
> A. Well, as I mentioned, that was a concern raised by Mr. Takushi, yes.
>
> ***
>
> Q. You would also agree that Mr. Crosby was removed in part because of concerns that he raised about conflicts of interest, correct?
>
> A. Yes.

Testimony of Dennis Goda: T. 12/5/90 at 25-10 through 25-23.

Mr. Takushi further confirmed that it was Mr. Crosby's concerns that prompted his removal.

> Q. Would you agree that Mr. Crosby was removed from the project in part because of his concerns that were expressed?
>
> A. To the extent that we needed to get the project underway and to the extent that everything was being bogged down, yes.

Testimony of Robert Takushi: T. 12/5/90 at 128-11 through 128-16.

> Q. The concerns you are referring to are Mr. Crosby's concerns.
>
> Mr. Fell: Objection, Your Honor. He's answered that last question.
>
> The Court: You may answer again. Overruled.
>
> A. The concerns that we have revolved [sic] about what Peter was concerned about.

Testimony of Robert Takushi: T. 12/5/90 at 146-25 through 147-6.

Mr. Goda and Mr. Takushi's admission that Mr. Crosby was removed from the project because of his stated concerns over the legality of the contract selection procedure and conflicts of interest is also confirmed by the testimony of Yukio Takemoto, Director of the Department of Budget and Finance. In his testimony, Mr. Takemoto stated that he discussed Mr. Crosby's concerns about the selection process with Mr. Goda. Deposition of Yukio Takemoto at 27-17 through 29-1.

> Q. Can you tell me what the substance of that discussion was?
>
> A. It had to do with Mr. Crosby's concern of whether or not Peat, Marwich & Mitchell -- Peat, Marwick, Main & Mitchell, now, was best suited for -- to undertake the project and that the department should have advertised it nationwide, worldwide, whatever the case may have been. We had discussion along that line. I have a

recollection that such a discussion took place.

Q. Did Mr. Goda talk to you about Mr. Crosby's performance on the project up until that point?

A. No.

Q. At any time did Mr. Goda talk to you about Mr. Crosby's performance on the project?

A. Our discussion was pretty much limited to Mr. Crosby's concern on the selection process.

Id. at 28-18 through 29-8.

Finally, Mr. Crosby himself confirmed at trial that he was told that he was removed from the project for reasons related to the concerns he had expressed.

The Court: You have indicated in your testimony when you were questioned by Mr. Grande that you felt your right to freedom of speech was affected by this matter when you were removed from the project. Would you tell me, would you explain to me how it is you felt your right to free speech was impinged upon?

> A. Yes, sir. I was expressing what I thought to be an issue of public concern. Mainly, that way this contract should be handled. Should it be put out to public bid or not. I expressed those views as has been discussed in this court. **And on April 18, I was told that I was removed from the project for reasons related to those views.**

T. 12/4/90 at 38-20 through 39-7 (emphasis added).

As shown above, there is no question that there was unequivocal evidence on the record to establish a causal nexus between Mr. Crosby's stated concerns and his removal from the tourism project. The overwhelming testimony shows that the only reason Peter Crosby was removed was that he was exercising his First Amendment Right of free speech.

This factual conclusion was underscored by the Hawaii Supreme Court itself when it ruled that "Crosby's

expression was inextricably intertwined with his removal from the project." Crosby v. State, 76 Hawaii at 344, 876 P.2d at 1312 (emphasis added). [3]

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[3] Also, the above-stated admissions by the Defendants are consistent with the level of proof for a substantial or motivating factor discussed in Price Waterhouse, 490 U.S. at 250:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

In Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), this court stated:

> "Davis [Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)] does not require a plaintiff to prove that the challenged action rested solely on

Having satisfied the first prong, the Hawaii Supreme Court should have shifted the burden to the State to prove by a preponderance of the evidence that it would have removed Peter Crosby even in the absence of his protected speech.

D. The Hawaii Supreme Ignored the Binding Precedent of This Court in Failing to Require the State to Prove by a Preponderance of the Evidence That It Would Have Removed Peter Crosby From His Position Even in the Absence of His Protected Speech

The Hawaii Supreme Court rejected the Mt. Healthy/Connick/Pickering standard and instead adopted a standard which did not impose upon the government the burden of

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> racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."

showing it would have reached the same decision absent the protected conduct.

The Hawaii Supreme Court applied the first part of the test and found that Mr. Crosby's "discussion of public affairs (the expenditure of public funds) enjoys the highest first amendment protection." Crosby v. State, 76 Hawaii at 343, 876 P.2d at 1311, Appendix A at 38. However, in finding that Mr. Crosby's voiced concerns about contractor selection and conflicts of interest were not a "motivating factor" in the State's decision to remove him from the project, the Court engaged in a convoluted analysis which has absolutely no basis in this Court's precedent and which conflicts directly with the Mt. Healthy/Pickering/Connick trilogy. The most egregious mistake of the Hawaii Supreme Court was not shifting the burden to the government to prove that it would have

reached the same decision even in the absence of the protected conduct.

How the Hawaii Supreme Court, in the face of unequivocal evidence on the record and its own above-quoted conclusion that Mr. Crosby was removed for his protected expression, found that his voiced concerns were not a motivating factor in his removal is a result of the Hawaii Supreme Court's fundamental misconstruction of this Court's recent decision in Waters v. Churchill, ___ U.S. ____, 114 S. Ct. 1878, 62 U.S.L.W. 4397, No. 92-1450 (May 31, 1994). The Hawaii Supreme Court replaced the test in Mt. Healthy with a quasi-Waters test, which focuses on the motivation and belief of the government (and is usually intended to determine what may have been known about potentially protected speech before a personnel action was taken). Thus, the Hawaii Supreme Court improperly imposed

a new standard -- that of improper motive -- in place of shifting the burden to the employer to show it would have reached the same decision in the absence of the protected conduct. This new standard imposes an additional burden on the plaintiff who must then refute the employer-stated causes, i.e., "bad blood" and delay, underlying the employer's action even though the triggering cause was admitted by the State to be the employee's speech.

E. The Hawaii Supreme Court Misapplied Waters v. Churchill and Improperly Ruled as a Matter of Law That the Motivation of the State Agents is the Proper Test to be Applied

In its decision, the Hawaii Supreme Court ruled that in determining whether or not Mr. Crosby's expression was a "substantial and motivating factor":

> The critical inquiry is whether the State, acting through Takushi, **harbored an improper**

> **motive in removing Crosby from the project.**

Crosby v. State, 76 Hawaii at 343, 876 P.2d at 1311, Appendix A at 36-37 (emphasis added).

In its opinion, the Hawaii Supreme Court looked to the record to determine that there was

> Substantial, credible evidence to justify a reasonable conclusion that the State's primary motive in removing Crosby from the project was to ensure that the project was completed expeditiously.

Crosby v. State, 76 Hawaii at 344, 876 P.2d at 1312, Appendix A at 40-41 (emphasis added).

This mispronouncement of the law underscores the problems with the Hawaii Supreme Court's decision. Mt. Healthy does not specify that a court should look to the "primary motive" of the government; Mt. Healthy mandates that the government meet

its burden by showing it would have taken the same action absent the protected conduct.

The Hawaii Supreme Court went on to look at the record evidence and to Mr. Takushi's statements of his motivation in removing Mr. Crosby from the project, which includes beliefs whose origins are traceable to Crosby's protected speech. [4]

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[4] The Hawaii Supreme Court considered the following factors in reaching its conclusion that the "primary motive" for removal of Mr. Crosby from the project was to insure that the project was completed expeditiously:

> Thus, the circuit court could reasonably conclude that it was not the fact that Crosby expressed his disapproval of Takushi's decision to employ a non-bid method of selection that prompted Takushi to remove Crosby from the project, but, rather, that Takushi's response was provoked by the delay and incompletion of the project and the "bad blood" occasioned by

Crosby's consistent refusal to accept Takushi's final decision after Crosby had surfaced his opinions.

In support of this conclusion, the record contained substantial evidence that: 1) the efficient handling of the project was important to Takemoto; 2) Takushi made the decision to remove Crosby from the project; 3) Takushi was sincere in his beliefs that the project was "bogged down" and not moving forward, Crosby had lost his objectivity, tension had developed between Crosby and Goda, and the department would function more efficiently if Crosby was reassigned; 4) Takushi predominantly based his decision on these beliefs; 5) Takushi acted without animus; and, 6) Crosby was never prohibited from speaking out about his concerns. In other words, the record supports the conclusion that Crosby's voiced concerns about the bid/non-bid issue were not a "motivating factor" in the State's decision to remove him from the project.

As shown above, the proper test requires shifting the burden to the government; the applied test requires analyzing whether there was an improper motive.

The Hawaii Supreme Court thus adopted the wrong test and denied Mr. Crosby the opportunity of meaningful review of the

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Crosby v. State, 76 Hawaii at 344, 876 P.2d at 1312, Appendix A at 41-44 (emphasis in original) (footnotes omitted).

The above-cited characterization of "bad blood" by the Hawaii Supreme Court as being caused by Crosby's speech is at variance with Takushi's description of "bad blood" as being a remembrance he formed from a meeting he had with Crosby about three years prior to the project. Findings of Fact 64. There was no corroborating testimony from Goda that there was any "bad blood" between himself and Crosby. Mr. Crosby testified that he had an excellent relationship with Mr. Goda during the period that he started the project. T. 12/3/90 at 154-21 through 155-7.

trial court decision. Adoption of a improper motive standard results in a tautology always in the State's favor -- as long as the State, through its agent, does not harbor an "improper motive" then it will meet its burden to show that adverse employment actions are not the result of protected First Amendment expression.

It is precisely for this reason that this Court adopted a standard which requires the government to prove by a preponderance of the evidence that it would have reached the same decision absent the protected conduct. Nowhere in the Hawaii Supreme Court formulation does the court attempt to impose this burden upon the State of Hawaii. Instead, the court looked to evidence in the record which would justify that the State did not harbor an improper motive in removing Mr. Crosby from the project.

Clearly, the Hawaii Supreme Court could not have reached its convoluted decision in support of the State and against Mr. Crosby in any other way. First, as shown above, there was clear and unequivocal evidence on the record that Mr. Crosby was removed because of his stated concerns. Second, the Hawaii Supreme Court itself acknowledged that Mr. Crosby's "expression was inextricably intertwined with his removal from the project". Crosby v. State, 76 Hawaii at 344, 876 P.2d at 1312, Appendix A at 40.

In sum, the Hawaii Supreme Court's pronouncement that

> The record supports the conclusion that Crosby's voiced concerns about the bid/non-bid issue were not a 'motivating factor' in the State's decision to remove him from the project.

Crosby v. State, 76 Hawaii at 344, 876 P.2d at 1312, Appendix A at 44, is based upon a

clear and unequivocal conflict with the Mt. Healthy/Pickering/Connick trilogy and an improper reliance upon the Waters v. Churchill test which looks to the reasonableness of the employer's motives.

F. The Hawaii Supreme Court Erred as a Matter of Law in Misapplying the Pickering Balance Test

The final error made by the Hawaii Supreme Court was in misapplying the balance first articulated in Pickering v. Board of Education, 391 U.S. 563 (1968).

As outlined above, if a court determines that a public employee was speaking out on a matter of public concern, the court must then balance the interest of the employee on commenting on matters of public concern against the State's interest in the "effective and efficient fulfillment of its responsibilities to the public." Connick, 461 U.S. at 150.

Although the Hawaii Supreme Court stated that Crosby's expression enjoyed the highest First Amendment protection, the court also concluded that the "minimal burden" placed on Crosby's rights by the State's adverse personnel action must yield in the Pickering balance to the general interests of the employer as expressed in Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring), and Waters v. Churchill, 114 S.Ct. 1878 at 1887-1888 (1994). Crosby v. State, 76 Hawaii at 343-345, 876 P.2d at 1311-1313.

This Court in Pickering 391 U.S. at 568-573, Givan, 439 U.S. at 415-416, Connick, 461 U.S. at 149-154 and Rankin, 483 U.S. at 388-392 presents criteria to be used in the Pickering balancing test to assess whether or not speech on a matter of public concern should be Constitutionally protected. The criteria presented by this

Court for this balance encompass generally the loyalty relationships of the participants, the disruption of the employee's conduct in the workplace, and the veracity and impact of his speech. Also, this Court has stated that when faced with potential disruption in the workplace, a government employer may act, but "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." Connick at 152.

The Hawaii Supreme Court followed the wrong legal test and applied the wrong factors in balancing the interests of Peter Crosby and the State. In its opinion, the Court found that

> [T]he balance of interests favor the State in light of the minimal burden on Crosby's First Amendment Rights. The State's action was not drastic, Crosby was not prohibited from speaking out, he was not discharged or otherwise disciplined, and the reason for his removal had not

> been made public. Under these circumstances, Crosby's First Amendment Rights must yield.

Crosby v. State, 76 Hawaii at 345. 876 P.2d at 1313, Appendix A at 46; citing Connick, 461 U.S. at 154.

The Hawaii Supreme Court improperly concluded that because it believed that the "State's action was not drastic," 76 Hawaii at 345, 876 P.2d at 1313, that on balance Peter Crosby's First Amendment Rights should yield to the State's interests. In fact, the balance does not relate to whether there has been a non-drastic action.

By concluding that Crosby's First Amendment rights must yield because of the minimal burden placed on him by the State's actions, the Hawaii Supreme Court adds a new criterium to the Pickering balance, namely, one that depreciates the value of the employee's speech by a factor based on the nature of the adverse action taken against

him. Such a matrix of speech value versus punishment value presents a new calculus in the Pickering balance that will favor the employer, since only events like an outright dismissal or a physical altercation with the employee would probably merit a high enough discount factor that would allow the employee's speech to hold its full value in the balancing test. Also, this criterium draws attention away from the employee's right to speak, the importance of the speech to society and the chilling effect that the employer's action may have on speech.

VII. CONCLUSION

The Hawaii Supreme Court improperly concluded that Peter Crosby's speech was not a motivating factor in his removal.

The Hawaii Supreme Court ignored this Court's binding precedent in Pickering and Mt. Healthy, and misconstrued this Court's decision in Waters. These errors in

interpreting these cases resulted in the misapplication of the proper legal standard and failed to require the State to justify that it would have disciplined Mr. Crosby even in light of his protected speech.

Aside from ignoring the binding precedent of this Court, the opinion of the Hawaii Supreme Court results in a judicial standard that will virtually always allow the employer to prevail in these types of cases.

For these reasons, the Petition for Writ of Certiorari should be granted.

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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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PETER A. CROSBY, Plaintiff-Appellant,
v.
STATE OF HAWAI'I DEPARTMENT OF BUDGET & FINANCE; STATE OF HAWAI'I DEPARTMENT OF ACCOUNTING & GENERAL SERVICES; YUKIO TAKEMOTO, Director of State of Hawai'i Department of Budget & Finance; RUSSEL NAGATA, State Comptroller; DOES 1-50, inclusive, Defendants-Appellees

NO. 16064

APPEAL FROM THE FIRST CIRCUIT COURT

(CIVIL NO. 89-2152-07)

July 18, 1994

MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, JJ., AND INTERMEDIATE COURT OF APPEALS CHIEF JUDGE BURNS, ASSIGNED BY REASON OF VACANCY
OPINION OF THE COURT BY KLEIN, J.

Plaintiff-Appellant Peter A. Crosby, an employee of the State of Hawai'i Department of Budget and Finance (DBF), appeals from judgment in a jury-waived trial entered against him and in favor of

Defendants-Appellees State of Hawai'i, DBF, State of Hawai'i Department of Accounting and General Services (DAGS), Yukio Takemoto, and Russel Nagata (collectively "the State"). We affirm.

I. Background

In 1988, the State Legislature appropriated $250,000.00 for the fiscal year 1988-89 to be expended by the DBF for a comprehensive management study of the state's tourism program and the Hawai'i Visitor's Bureau ("the project"). Act 390, § 247A, 1988 Haw. Sess. Laws 759, 829. In July 1988, Dennis Goda, Chief of the Budget, Planning and Management Division of DBF, assigned to Crosby, a DBF Resource Allocations Systems Analyst (RASA),[1] the task of preparing specifications to

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[1] Crosby, a twenty year DBF employee, was one of two program evaluators employed by DBF in July 1988.

facilitate the hiring of a consultant to conduct the project. Goda was Crosby's immediate supervisor.

Crosby timely prepared the project specifications and presented them to Goda. Goda then directed Crosby to prepare a request for proposal (RFP) for the project. Crosby prepared a draft RFP and presented it to Goda on or about September 7, 1988. In addition, Crosby reviewed Hawai'i Revised Statutes (HRS) Chapter 103, Expenditure of Public Money and Public Contracts, and concluded that HRS § 103-22 (Supp. 1992)[2]

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[2] HRS § 103-22 provides in relevant part:

> Advertisement for bids required; exceptions. No expenditure of public money, except salaries or pay of officers or employees, or permanent settlements, subsidies or other claims or objects for which a fixed sum must be paid by law, or for other purposes which do not admit of competition, or for the purchase of materials or supplies from any other

mandated selection of a consultant for the project through competitive bid. Accordingly, Crosby recommended this method of selection to Goda and prepared documents necessary for public advertisement of the project. Goda agreed with Crosby's recommendation and directed Crosby to

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> department, bureau, organization, or municipal or political subdivision of the federal, state, municipal or county governments, other than University of Hawai[']i bookstores, or for the performance of public work or contracts by any other such department, bureau, organization, or municipal or political subdivision of the state, state, municipal or county governments, where the sum to be expended is $8,000 or more shall be made except under contract let after advertisement for sealed tenders, in the manner provided by law. . . . No expenditures for public purposes shall be so divided or parceled as to defeat or evade this section.
>
> (Emphasis added.)

finalize the RFP. Crosby later delivered the RFP to Goda who, in turn, sent it to Yukio Takemoto, the Director cf the DBF. Because of the project's importance, Takemoto assigned the project to DBF Deputy Director Robert Takushi for supervision on September 20, 1988; that way, Takemoto could "keep an eye" on the project through Takushi. It was understood by all involved that the project was very important to Takemoto.

After reviewing the RFP Takushi requested certain schedule revisions. Crosby made these revisions, and on November 1, 1988, forwarded the revised RFP to Goda with a memorandum enclosing documents for the advertisement of the project for competitive bid. On November 3, 1988, Goda sent the RFP and Crosby's memorandum to Takushi and recommended that Takushi approve the advertisement. Takushi considered the

recommendations of both Crosby and Goda. Based on his own understanding of the law, however, Takushi decided that the selection procedure could be "non-bid" and directed Goda to send the RFP only to the largest accounting firms, i.e., the "big-eight" accounting firms.

On November 8, 1988, Goda informed Crosby of Takushi's decision and directed Crosby to select only the "big-eight" accounting firms for receipt of the RFP. Because he believed that a non-bid selection procedure for the project would violate HRS § 103-22, Crosby declined Goda's directive. Consequently, Goda selected the eight largest accounting firms from the "yellow pages" and requested that Crosby draft "letters of invitation" to each enclosing the RFP.

On November 10, 1988, Crosby prepared a memorandum to accompany his internal

transmission of draft letters of invitation to the big-eight firms. The memorandum confirmed in writing Crosby's position that HRS § 103-22 required bids for the project be solicited through competitive means by advertising, and urged that the mandated selection procedure be reconsidered. Thereafter, Goda contacted DAGS seeking its opinion on the bid or non-bid issue. DAGS advised Goda that the project need not be advertised and could "go non-bid." Accordingly, via memorandum on November 12, 1988, Goda responded to Crosby's prior memo by stating:

> Although I agree with your reading of Section 103-22, H.R.S., it seems that the DAGS, the agency responsible for the interpretation of Section 103-22, suggests that much [sic] of these contracts (if not all) do not lend itself [sic] to competition; therefore, exempt [sic]. Further, although we have recommended that the contract be put out to bid, we have been instructed to limit notice to 'large accounting firms'.

Still firm in his conviction that § 103-22 compelled acompetitive bid, Crosby telephoned Deputy Attorney General Patricia Ohara to voice his concerns. Although this discussion concerned the application of HRS § 103-22 in general terms only (without discussing the specifics of the project), Crosby was encouraged that the Department of the Attorney General might favor his position. Thus inspired, Crosby generated a November 16, 1988 memorandum to Goda exhorting the DRF to obtain an Attorney General's Opinion regarding the application of HRS § 103-22 to the project. Goda answered that the decision to "go non-bid" was final.

The RFPs were sent to the "big-eight" accounting firms. By the beginning of 1989, two national accounting firms had responded with proposals: Peat, Marwick, Main & Company ("Peat-Marwick") and Arthur Young &

Company ("Arthur Young"). On January 10, 1989, Goda asked Crosby to evaluate the proposals and determine which was preferable. On February 3, 1989, Crosby informed Goda that, in his opinion, both proposals were inadequate. Further, Crosby expressed concern that both Peat-Marwick and Arthur Young had potential conflicts of interest: because each had previously performed consultant work for the Hawai'i Visitor's Bureau, they would be reviewing their own work.

Goda presented Crosby's conflict of interest concern to the State Auditor and the State Board of Accountancy. Each advised Goda that any conflict of interest could be addressed by either firm, and, therefore, disqualification was not warranted. On February 23, 1989, Goda relayed this information to Crosby with notification that Takemoto had selected

Peat-Marwick to be consultant for the project. Accordingly, Crosby was asked by Goda to prepare an appropriate contract for his review. Crosby prepared the contract and submitted it to Goda on February 28, 1989, together with a memorandum memorializing his dissatisfaction concerning the adequacy of the proposals and restating his conflict of interest concern. Following standard procedure, Goda instructed Crosby to forward the contract to the Department of the Attorney General for a review as to form.

Deputy Attorney General Diane Erickson reviewed the contract and submitted written comments to Crosby on March 6, 1989. Among her comments, Erickson questioned why the contract did not contain a "sole source or non-competitive" clause. Crosby then arranged a meeting with Erickson on March 8, 1989 to discuss the contract. At the

meeting, Crosby explained the project and discussed his position regarding the application of HRS § 103-22. Erickson agreed that Crosby had raised legitimate concerns but, because the issues fell within a "grey area," informed him that she wished to discuss the matter further with her supervisor. In the meantime, Crosby left the draft contract with Erickson.

Subsequently, on March 14, 1989, Erickson spoke with Crosby by telephone. She explained that there are two clearly recognized exceptions to the HRS § 103-22: the common law "sole source" doctrine and the statutory "does not admit of competition" clause.[3] The decision whether

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[3] HRS Chapter 103 does not define what purposes "do not admit of competition" under HRS § 103-22. Contracts for such purposes are sometimes referred to interchangeably as "sole source" or "consultant" contracts. Sole source contracts

to apply these exceptions to the project was left to the discretion of the Director of the DBF.[4] Erickson said she would send a

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may have as their subject the purchase of unique goods or the retention of highly technical professional services. In any event, a state official seeking to let a sole source contract must obtain "sole source approval" from DAGS. If DAGS denies approval, the department may request sole source approval directly from the Governor.

In 1977, the Director of DAGS (the State Comptroller) issued a memorandum ("Circular 1977-3") attempting to set out the types of contracts that do not admit of competition and outline a procedure for requesting sole source approval from DAGS. Circular 1977-3 was distributed to the directors of all state departments.

[4] The State explains that the nature and importance of the project required the exercise of professional judgment by the contractor; consequently, the State concluded that the project should not be awarded to the lowest responsible bidder, but to an experienced firm with proven judgment quality. See HRS § 103-32 (exempting "purposes which

confirming note to Crosby on this subject.

On April 7, 1989, Erickson returned the draft contract to Crosby with a note stating:

> As you know, chapter 103, [HRS], requires most contracts to be awarded by competitive bidding. If the requirements of Chapter 103 are not satisfied, you must be aware that the contract is subject to challenge. I trust that your office's records indicate the reasons why this contract is a sole source or consultant's contract.

Because sole source approval had not been obtained, and because he continued to believe that the "do[es] not admit of competition" statutory exception did not

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do not admit of competition" from the bid requirement). Instead, the State claims that it may contract with a selected firm on a "non-competitive" basis under the "consultant" exemption to HRS § 103-22, see supra footnote 3, and, as such, the submissions from Peat Marwick and Arthur Young did not constitute competitive bids.

apply to the contract, Crosby assumed Erickson's note was a subtle suggestion that he falsify his files.[5] Therefore, Crosby once again met with Erickson on April 11, 1989 to discuss her note. At this meeting, Crosby told Erickson that the issue he raised about the propriety of a non-bid selection process had not been-resolved. Erickson offered little more than that she was not aware of any written Attorney General's Opinion on point.

Crosby remained convinced that a "sole source" or "non-competitive" clause was improper and, therefore, his inclusion of this type of term in the contract might

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[5] The trial court specifically found, however, that "Erickson, through her comments and transmittals, never meant that [Crosby] lie, conceal the truth, break the law, or manufacture documents." FOF 57.

constitute participation in a law violation.[6] On April 12, 1989, Crosby forwarded the contract (without a sole source clause) to Goda, including Erickson's April 7th note and his own memo pointing out that Erickson's comment appeared to raise the some concerns that he had. As the trial court noted, "[i]n essence, Crosby's April 12, 1989 memorandum to Goda raised in written form once again, Crosby's argument that the project should go bid." Findings of Fact (FOF) 60.

On April 14, 1989, Erickson met with Takushi to discuss various matters. Among them, Erickson mentioned Crosby's persistent concern regarding the procedure used in

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[6] HRS § 103-48 (1985) provides that any person who violates § 103-22 shall be fined not more than $1,000 and/or imprisoned more than one year. HRS § 85-32 (1985) requires all public employees to uphold the laws of the State.

selecting a consultant for the project. Takushi asked Erickson if there was an exception to the public bid requirement that was applicable to the project. Erickson replied that there was such an exception, effectively reassuring Takushi that his prior understanding that the project could "go non-bid" was in fact legally correct.

Thereafter, Takushi met with Goda to air Crosby's concerns. Despite the fact that Crosby was not an attorney, had no expertise ln this area, and had never before been involved in drafting this type of contract, he insisted that the project should be competitively bid even though his supervisors, DAGS and the Attorney General's office felt otherwise. See supra note 4 (explaining the State's apparent rationale). Takushi testified that during the meeting with Goda he formed the impression that the project was "bogged down" and not moving

forward; that Crosby was losing his objectivity; that he was not getting the job done and was in fact creating tension; and that antagonism and "bad blood" had developed between Goda and Crosby. Takushi thus concluded that the project would be administered more efficiently if Crosby was reassigned. Accordingly, Takushi directed Goda to remove Crosby from the project.

Crosby learned of his removal from the project a few days later when Al Chun, a DBF management analyst, informed Crosby that he would be replacing him on the project. Chun had been told he was taking over because Crosby was "too busy" on other projects. Chun completed the contract and included a clause indicating that the subject of the contract did not admit of competition. See supra notes 3, 4 and accompanying text (discussing "sole source" and "non-competitive" clauses). The DBF sent

the final version of the contract to Peat-Marwick for signature on April 19, 1989.[7] Before the end of April 1989, however, Takushi contacted Peat-Marwick and explained that a complaint (apparently Crosby's civil complaint) had been or would be filed challenging the validity of the selection procedure employed for the project. As a result, Peat-Marwick deferred execution of the contract.[8]

On July 14, 1989, Crosby filed a

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[7] At this time, sole source or consultant contract approval had neither been obtained nor requested. Takushi nevertheless testified that he intended to obtain these approvals.

[8] Subsequently, in September 1989, Goda directed Chun to evaluate a tourism project that recently had been conducted by the Legislative Auditor. Chun concluded that the Legislative Auditor's study was very similar to the study contemplated by the project. Consequently, Takemoto cancelled the project.

verified complaint alleging that his removal from the project violated the Hawai'i Whistleblowers' Protection Act ("HWPA"), HRS §§ 378-61 to -69 (Supp. 1992), and requesting that the court order his reinstatement to the project and enjoin any future retaliatory action. By August 1, 1990, Crosby had filed first and second amended complaints alleging that his removal also violated his free speech rights under the federal and state constitutions ("First Amendment Rights")[9] and that Circular 1977-3

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[9] Crosby alleges violations of the first amendment to the United States Constitution, and article I, section 4 of the Hawai'i Constitution (1978). Effectively, the language of both is identical. State v. Manzo, 58 Haw. 440, 452, 573 P.2d 945, 953 (1977). In ruling on state law, this Court may look for guidance to federal case law interpreting similar provisions. Pele Defense Fund v. Paty, 73 Haw. 578, 603, 837 P.2d 1247,1263 (1992) (citation omitted). Although this court may find that the

was invalid because it was not promulgated in conformity with the Hawai'i Administrative Procedures Act ("HAPA"), HRS Chapter 91.

After a four-day trial, the trial court issued ninety-seven FOF and ten Conclusions of Law (COL) in support of an order favoring the State defendants. Accordingly, judgment was filed on March 18, 1992.[10]

Hawai'i Constitution affords greater free speech protection than its federal counterpart, Crosby has not urged such a holding and the federal decisions would afford adequate protection in the context of the instant case. Consequently, we shall discuss, as the parties have, the first amendment to the United States Constitution as dispositive of the issues under article I, section 4 of the Hawai'i Constitution.

10 On May 18, 1992, the court issued an order denying Crosby's motion to amend judgment, to alter or modify judgment, [and/or] to order the taking of additional testimony. Although no reasons were given for denying

On appeal, Crosby specifically challenges the trial court's COL 2, 3 and 7, which read as follows:

> 2. The State of Hawaii did not discriminate against Crosby regarding compensation, terms, conditions, location or privilege of employment as those terms are used [HRS] Section 378-22 [sic, presumably HRS § 378-62].
>
> 3. Further, there was no causal nexus between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project at issue.
>
> 7. Circular 1977-3 is not a

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this motion, it appears from our review of the record that the State was correct in arguing that the motion merely sought non-essential changes and additions.

Crosby attached an affidavit to his motion suggesting that retribution had in fact, contrary to FOF 85 (finding no evidence suggesting the potential for retribution in the future), taken place between final argument at trial and issuance of the court's judgment. The trial court properly rejected this argument, however, after careful consideration.

rule or regulation, but is merely a guideline that is not subject to the provisions of [HAPA].

II. Standards of Review

Crosby has failed to specifically identify any relevant FOF as error,[11] and no

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[11] Crosby indirectly challenges FOF 41, which he claims improperly

> infers [sic] that he raised the conflict of interest issue because of the fact that "on February 3, 1989, he understood that if neither proposal succeeded then he would have an increased opportunity to persuade his superiors that the project should go bid [sic]" and as such is absolutely contrary to the evidence.

(Quoting from FOF 41.) Crosby's challenge reflects an attempt to bolster the contention that his speech addressed a matter of public concern. As will be discussed in the following section, we agree in part with Crosby that his speech is entitled to constitutional protection; nonetheless, we conclude that the trial court correctly decided that no causal nexus existed between Crosby's expression and his reassignment. As such, the trial court's finding is not clearly erroneous.

plain error appears from the record; accordingly, the trial court's FOF are unchallenged for the purposes of appeal and, as such, are the operative facts of the case. Leibert v. Finance Factors, Ltd., 71 Haw. 285, 288, 788 P.2d 833, 835, reconsideration denied, 71 Haw. 664, 833 P.2d 899 (1990).

With respect to Crosby's challenges to COL 2 and 7, "[t]he interpretation of a statute is a question of law which this court reviews de novo. When construing a statute, our foremost obligation 'is to ascertain and give effect to the intention of the legislature,' which 'is to be obtained primarily from the language contained in the statute itself.'" Richardson v. City & County of Honolulu, 75 Haw. ___, ___, 868 P.2d 1193, 1210, reconsideration denied, 75 Haw. ___, 871 P.2d 795 (1994) (citations omitted).

However,

> we have rejected an approach to statutory construction which limits us to the words of a statute . . . for when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.

Id. at ___, 868 P.2d at 1215 (Klein, J., dissenting) (citing Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 421, 653 P.2d 420, 424 (1982)).

Thus, the plain language rule of statutory construction,

> does not preclude an examination of sources other than the language of the statute itself even when the language appears clear upon perfunctory review. Were this not the case, a court may be unable to adequately discern the underlying policy which the legislature seeks to promulgate and, thus, would be unable to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute.

Survivors of Medeiros v. Maui Land & Pineapple Co., 66 Haw. 290, 297, 660

P.2d 1316, 1321 (1983)[.]

Id. at ___, 868 P.2d at 1215-16 (Klein, J., dissenting).

Although COL 3 is set out as a conclusion of law, the trial court's label is not determinative of the standard of review. A determination that embraces an ultimate fact is a factual finding subject to the clearly erroneous standard of review even though classified as a COL. Molokoa Village Dev. Co. v. Kauai Elec. Co., 60 Haw. 582, 596, 593 P.2d 375, 384 (1979); see also Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991) (noting that mixed questions of fact and law are reviewed under the clearly erroneous standard). Accordingly, a COL, by which the trial court determines whether a party has met its burden of establishing elements of liability, is to be upheld unless clearly erroneous. Molokoa Village, 60 Haw. at 596, 593 P.2d at 384.

Here, a causal connection between the speech and Crosby's removal is necessary for Crosby to obtain relief. In the context of Crosby's challenge based on the HWPA, therefore, the trial court's determination of causation is reviewed under the clearly erroneous standard. See Meyers v. Board of Trustees of Employees' Ret. Sys., 68 Haw. 94, 97, 704 P.2d 902, 905 *(1985)*.

To the extent that Crosby's claim is based on his First Amendment Rights, see supra note 9 and accompanying text, however, we must make "an independent constitutional judgment on the facts *of* the case." Connick v. Meyers, 461 U.S. 138, 150 n.10 (citations omitted); see also Waters v. Churchill, No. 92-1450, slip op. at 5 (U.S. May 31, 1994) (plurality opinion) (noting that it is "agreed that it is the court's task to apply

the Connick test to the facts").[12]

III. Discussion

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[12] In Waters, the Justices of the United States Supreme Court split with respect to the factual basis for applying the Connick test, see infra section III.B. (citing Connick, 461 U.S. at 149, 150-54), on review of a lower court's grant of summary judgment in favor of a public hospital, which discharged an employee because of statements she made to a co-worker. The actual statements made by the employee were disputed.

As indicated previously, the facts are not disputed in the instant case, so we need not decide whether the State's investigation met the Waters plurality's "reasonableness test." Nonetheless, were we to apply the test based on Crosby's indirect challenge to FOF 41, see supra note 11, the State's action would still pass constitutional muster. "[I]f the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." Waters, slip op. at 18. See infra section III.B. (listing evidence supporting the State's decision to remove Crosby from the project).

A. Application of the HWPA

HRS § 378-62 provides in relevant part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because: 1) The employee . . . reports or is about to report to a public body, verbally or writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false . . . .

(Emphasis added). Crosby complains that the trial court construed the HWPA too narrowly in COL 2 and that his removal affected a "condition" of employment. The State counters that the mere reassignment of a project within DBF could not have affected any "condition" of Crosby's employment; rather, DBF took appropriate management action.

The terms "compensation, terms,

conditions, location, or privileges of employment" are not defined in HRS chapter 378. The ordinary definition of "condition" includes "[a]ttendant circumstances; existing state of affairs . . . " (Webster's New International Dictionary 556 (2d ed. 1960)) and "situation with respect to circumstances; existing state or case . . . ." The Random House Dictionary of the English Language 280 (Rev. ed. 1979). Clearly, one of the "circumstances" of Crosby's employment was that he was assigned to the project. A broad reading of the term "condition" in the HWPA is in accord with the legislative intent. See discussion supra section II (citing Richardson (Klein, J., dissenting), 75 Haw. at ___, 868 P.2d at 1215-16).

Legislative history confirms that the HWPA provides protection to employees who report suspected violations of law from "any

form of retaliation by their employers." Sen. Stand. Comm. Rep. No. 1127, in 1987 Senate Journal, at 1392 (emphasis added). Specifically, the legislature intended that the HWPA bar "discharge, discrimination and other forms of adverse action . . . ." Sen. Stand. Comm. Rep. No. 833, in 1987 Senate Journal, at 1249 (emphasis added). Furthermore, the HWPA is a remedial statute. See Flores v. United Airlines, Inc., 70 Haw. 1, 12 n.8, 757 P.2d 641, 647 n.8 (1988) (citations omitted). As such, the HWPA should be construed liberally to accomplish the purpose for which it was enacted. Id. (citation omitted); see also Richardson (Klein, J., dissenting), 75 Haw. at ___, 868 P.2d at 1215-16.

In order for an employee to prevail under the HWPA, however, the employer's challenged action must have been taken "because" the employee engaged in protected

conduct in order to be considered "discriminat[ory]" under the HWPA. In other words, a causal connection between the alleged retaliation and the "whistleblowing" is required. The HWPA's legislative history indicates that the legislature intended that the required burden of proof be similar to that utilized in traditional labor management relations discharge cases. Under the National Labor Relations Act, as amended, 29 U.S.C. §§ 151-168 (1988), an employee has the burden of showing that his or her protected conduct was a "substantial or motivating factor" in the decision to terminate the employee. See also Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P-2d 625, 631 (1982) (noting that "the plaintiff alleging a retaliatory discharge bears the burden of proving that the discharge violates a clear mandate of public policy").

In reviewing an initial draft of the HWPA, the House Standing Committee reported:

> the bill imposes the burden of proof on the employee and also establishes a higher standard of proof than normally applied in civil cases. Under existing custom and practice in labor management relations discharge cases, the burden of proof is placed on the employer. Accordingly, your Committee amended the bill to remove subsection (d) of section -3, thereby maintaining the existing custom and practice of placing the burden of proof on the employer in discharge cases.

Hse. Stand. Comm. Rep. No. 25, in 1987 House Journal, at 1090.[13] We note, however, that

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[13] Subsection (d) of section -3 would have required that an employee bringing a challenge under the HWPA establish his or her claim under a "clear and convincing" standard of proof. H. B. No. 5 (1987). At the same time the legislature deleted this provision, it also added the following:

> The rights created herein shall not be construed to limit the development of the common law nor to preempt the common law rights and remedies on the subject matter of discharges which are contrary to public

an aggrieved employee always retains the ultimate burden of proof in a retaliatory discharge case. Sonicraft, Inc. v. NLRB, 905 F.2d 146, 150 (7th Cir. 1990), cert. denied, 498 U.S. 1024 (1991). The legislature must have been referring to the corresponding rule that "the burden of negating causation is on the employer." Id. Once the employee shows that the employer's disapproval of his first amendment protected expression played a role in the employer's action against him or her, "[t]he employer can defend affirmatively by showing that the termination would have occurred regardless

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policy. In the event of a conflict between the terms and provisions of this part and any other law on the subject the more beneficial provisions favoring the employee shall prevail.

HRS § 378-69 (Supp. 1992); see also Hse. Stand. Comm. Rep. No. 25, in 1987 House Journal, at 1090 (referring to Parnar).

of the protected activity." NLRB v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1990) (citing NLRB v. Transportation Management Corp., 462 U.S. 393, 401-03 (1383)). "In other words, the employer has an affirmative defense (no causation), as to which of course he bears the burden of persuasion, but so far as the main case is concerned the burden of persuasion never shifts." Sonicraft, 905 F.2d at 150. Although "the trial court did not refer to any standard of proof" in its resolution of the instant case, "a presumption arises that it applied the correct standard." State v. Aplaca, 74 Haw. 54, 66, 837 P.2d 1298, 1305 (1992) (applying this rule in a criminal case where the trial court "merely commented on the nature of the evidence in support of the finding of guilt"; specifically, the trial court noted that the witness' testimony was more credible than the

defendant's).

Crosby's argument is grounded on the testimony of Goda and Takushi to the effect that Crosby was removed from the project, in part, because of his expressed opinions. During oral argument Crosby's counsel protested that Crosby was removed from the project because he refused to lie by adding "sole source" or "non-competitive" language to the contract. The question of the State's motivation in removing Crosby is certainly susceptible to differing views. Nonetheless, there is substantial evidence in the record, see infra section III.B. (listing six relevant facts), to support the trial court's COL 2 and 3, as they pertain to COL 5.[14] The trial court did not err

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[14] COL 5 reads:

> The State of Hawai[']i did not violate the Whistleblowers' Protection Act, Chapter 378, H.R.S.

when it found that there was no causal nexus between Crosby's protected expression and his removal from the project, nor when it concluded that the State did not discriminate against Crosby regarding a condition of his employment.

In any event, we agree with the trial court's conclusions even on de novo constitutional review, as expressed in the following section.

B. Crosby's First Amendment Claim

The question whether Crosby's expression was a "substantial or motivating factor" causing his removal from the project is presented in a slightly different context under Crosby's challenge to COL 3, which is based on his First Amendment Rights. As in section III.A., supra, the critical inquiry is whether the State, acting through Takushi, harbored an improper motive in removing Crosby from the project.

Resolution of this issue in the first amendment context depends on a fine distinction between Crosby's expression and his conduct related to that expression.

The law in this area is well-settled. A public employee claiming that an employer's action violates the speech clause of the first amendment bears the initial burden of making a prima facie showing that 1) the conduct was constitutionally protected, and 2) the conduct was a "substantial" or "motivating" factor in the government's decision to take the challenged action. Mt. Healthy v. Doyle, 429 U.S. 274 (1977). Once that showing is made, the burden shifts to the government to show by a preponderance of the evidence that it would have reached the same decision absent the protected conduct. Id.

Crosby's discussion of public affairs (the expenditure of public funds) enjoys the

highest first amendment protection. Connick, 461 U.S. at 148 n.7; see also Pickering v. Board of Ed., 391 U.S. 563, 571-72 (1968) (high school teacher's criticism of board of education's allocation of public school funds was matter of "legitimate public concern").

In Connick, a New Orleans District Attorney (Petitioner) proposed to transfer an Assistant District Attorney (ADA or Respondent) to prosecute cases in a different section of the criminal court. Respondent strongly opposed the transfer, expressing her view to several of her supervisors, including Petitioner. She then prepared a questionnaire, which she distributed to the other ADAs, concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in

political campaigns. Petitioner then informed Respondent that she was being terminated for refusal to accept the transfer and also told her that her distribution of the questionnaire was considered an act of insubordination. The trial court determined that the questionnaire was the real reason for Respondent's termination and that the Petitioner did not "clearly demonstrate[]" that the questionnaire interfered with the operation of the District Attorney's office. Id. at 142. Accordingly, the trial court held that Respondent was wrongfully discharged because she had exercised her constitutionally protected right of free speech regarding matters of public concern. Id. at 141. The United States Court of Appeals for the Fifth Circuit affirmed. Id. at 142.

The United States Supreme Court

reversed in Connick, holding that Respondent's discharge did not offend the first amendment. The Court concluded that the only matter of public concern contained in the questionnaire was the question regarding pressure on employees to work in political campaigns. See id. at 148-49. With respect to Respondent's expression on that issue, the Court held that the balance between Respondent's interest in commenting on matters of public concern and Petitioner's interest in promoting efficient public service favored the latter. Id. at 150-54.

Although Crosby's expression was inextricably intertwined with his removal from the project, there is substantial, credible evidence to justify a reasonable conclusion that the State's primary motive in removing Crosby from the project was to ensure that the project was completed

expeditiously. For example, Takushi testified at trial that he had two people to think about (Goda was apparently frustrated with Crosby's handling of the project) and that he felt DBF's responsibilities would be executed more efficiently if the project were reassigned. Thus, the circuit court could reasonably conclude that it was not the fact that Crosby expressed his disapproval of Takushi's decision to employ a non-bid method of selection that prompted Takushi to remove Crosby from the project, but, rather, that Takushi's response was provoked by the delay and incompletion of the project and the "bad blood" occasioned by Crosby's consistent refusal to accept Takushi's final decision after Crosby had surfaced his opinions.

In support of this conclusion, the record contains substantial evidence that: 1) the efficient handling of the project was

important to Takemoto; 2) Takushi made the decision to remove Crosby from the project; 3) Takushi was sincere in his beliefs that the project was "bogged down" and not moving forward, Crosby had lost his objectivity, tension had developed between Crosby and Goda, and the department would function more efficiently if Crosby was reassigned;[15] 4) Takushi predominantly based his decision on

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[15] At trial, the State could not identify any specific delay in the administration of the project attributable to Crosby and further acknowledged that it was Crosby's obligation to raise concerns with his supervisors. FOF 65. Nonetheless, "Takushi believed that the project was getting bogged down and was being delayed by Crosby's concerns, that Crosby was losing his objectivity because of his concerns, and felt that there was 'bad blood' between Goda and Crosby on the basis of a discussion that he held with Crosby three years earlier." FOF 64.

these beliefs;[16] 5) Takushi acted without animus;[17] and, 6) Crosby was never

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[16] The following FOFs, which are particularly relevant to Takushi's perception that the project was unreasonably delayed, are supported by substantial evidence contained in the record:

> 72. Takushi was not aware that the director had failed to select a contractor until February 23, 1989, more than five weeks after the January 20, 1989 selection deadline.
>
> 73. Takushi was not aware that Erickson was in possession of the draft contract from March 8, 1989 to April 7, 1989.
>
> 74. The personnel decision to reassign the tourism project from Crosby to another RASA was based on Takushi's concern that the project move forward, and his sense that the Department would function more efficiently if he was able to unhook the particular project from the Plaintiff.

[17] The trial court found that "Takushi decided to remove the project from Crosby because the project was bogged down, not moving forward, because Goda

prohibited from speaking out about his concerns. In other words, the record supports the conclusion that Crosby's voiced concerns about the bid/non-bid issue were not a "motivating factor" in the State's decision to remove him from the project.

Even were we to assume that Crosby's protected conduct was a motivating factor in the State's decision to remove him, Takushi's actions are nevertheless consistent with Crosby's First Amendment Rights. Where a public employee's protected expression contributes to the employer's decision to take adverse action, the court must still determine whether the employer's decision was justified. Connick, 461 U.S. at 149. Such a determination requires a

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showed his frustrations in dealing with Crosby's concerns, and because Plaintiff appeared to be losing his objectivity." FOF 70.

delicate balancing of the employer's legitimate interest in the effective and efficient fulfillment of its responsibilities to the public and the employee's right, as a private citizen, to participate in discussions concerning public affairs. Id. at 150-54.[18] The State's interest has been aptly noted as follows:

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale m the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J.,

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[18] The proper balancing requires an independent constitutional judgment by the reviewing court. Id. at 150 n.10 (citations omitted). See also Waters, slip op. at 5.

concurring). Most recently, the United States Supreme Court stated that:

> When someone who is paid a salary so that [he] will contribute to an agency's effective operation begins to . . . detract from the agency's effective operation [by doing, saying, or failing to do certain things], the government employer must have some power to restrain [him].

In the instant case, the balance of interests favors the State in light of the minimal burden on Crosby's First Amendment Rights. The State's action was not drastic, Crosby was not prohibited from speaking out, he was not discharged or otherwise disciplined, and the reason for his removal had not been made public. Under these circumstances, Crosby's First Amendment Rights must yield. Connick, 461 U.S. at 154.

C. Alleged Violation of HAPA

Finally, Crosby asserts that the trial court erred in concluding that Circular

1977-3 is not subject to the strictures of HAPA.[19] COL 7 states that "Circular 1977-3 is not a rule or regulation, but is merely a guideline and is not subject to the provisions of HAPA."

The trial court's FOF 96, which is substantially supported in the record, states that:

> Circular 1977-3 is simply a guideline by the [DAGS] to the other department

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[19] HRS § 91-1(4) (1985) provides that:

> "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of the agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor interagency memoranda.

> heads m the State of Hawai[']i, as to how the [DAGS] interprets Section 103-22, H.R.S., insofar as the sole source issue is concerned. Circular 1977-3 does not bind any member of the public nor any public employee with respect to any substantive right that may be inferred under Section 103-22, H.R.S. Rather, it is simply an internal guideline that the Comptroller may ignore or not. Further, the Government may also ignore it.

(Emphasis added.) Circular 1977-3 was sent only to other state agencies and does not command or prohibit any action by any member of the public or any public employee. See Doe v. Chang, 58 Haw. 94, 96, 564 P.2d 1271, 1273 (1977) (holding that agency manual, which did not "command the public to do anything, prohibit the public from doing anything or declare the rights of the public in any respect [nor] make any procedures available to the public[,]" was not a rule or regulation under HAPA). By the clear language of HRS § 91-1(4), therefore, HAPA does not apply and COL 7 is not wrong.

IV. Conclusion

The trial court's determination that there-was no causal connection between Crosby's expression and his reassignment is not clearly erroneous. Although we are persuaded that the removal of Crosby from the project affected a condition of his employment, the record establishes that this action was not undertaken because Crosby engaged in protected conduct; the State, therefore, did not violate the HWPA or the first amendment when it reassigned the project to someone else. Finally, the DAGS did not violate HAPA when it circulated a memorandum to other state agencies interpreting the "sole source" provisions of Hawai'i purchasing law.

Judgment affirmed.

Thomas R. Grande (Stanley E. Levin with him on the briefs, of Davis & Levin) for plaintiff-appellant.

Charles F. Fell, Deputy
Attorney General,
for defendants-appellees.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PETER A. CROSBY, Plaintiff, vs. STATE OF HAWAII; STATE OF HAWAII DEPARTMENT OF BUDGET & FINANCE; STATE OF HAWAII DEPARTMENT OF ACCOUNTING & GENERAL SERVICES; YUKIO TAKEMOTO, Director of State of Hawaii Department of Budget & Finance; RUSSELL NAGATA, State Comptroller; DOES ONE through 50, inclusive, Defendants.	CIVIL NO. 89-2152-07 (Other Civil Action) FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on for trial before this Court on December 3, 4, 5 and 6, 1990, and the Court having considered all the evidence, the arguments of counsel

including the written submittals of the parties which continued to be offered to the Court into the month of February 1991 and the Court being fully advised on the premises, the Court hereby finds the facts and states its conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff PETER A. CROSBY is a resident of the island of Oahu, State of Hawaii.

2. The State of Hawaii is a governmental entity and is a sovereign state of the United States of America.

3. The Department of Budget and Finance is a department of the sovereign state of the State of Hawaii.

4. The Department of Accounting and General Services is a department of the sovereign State of Hawaii.

5. Yukio Takemoto, hereinafter "Takemoto", is the Director of the Department of Budget and Finance and has been the director at all times relevant to the instant suit.

6. Russell Nagata is the State Comptroller and has been the State Comptroller at all relevant times in the instant suit.

7. Crosby is the Plaintiff in this case and is employed and was employed by the Department of Budget and Finance of the State of Hawaii as a resource allocation systems analyst (RASA), and as such it was within his job description to prepare the analysis and documentation and research for projects assigned to the Department of Budget and Finance.

8. The Legislature of the State of Hawaii enacted House Bill 2081 into law as Act 390 of the Session Laws of Hawaii, 1988.

Section 247A of that Act provided as follows:

SECTION 247A. Provided of the general fund appropriation for the Department of Budget and Finance program planning, analysis and budgeting (BUF 101), the sum of $250,000 in fiscal 1988-89 shall be expended for a comprehensive management study of the state's tourism program in the Hawaii Visitor's Bureau to include but not be limited to:

organizational and financial analysis, assessment of the existing planning and management structure and staffing, analysis of the coordination and funding of tourism related research and data base activities, analysis of the coordination and funding of

tourism advertising and promotion, review and evaluation of business and economic developments, strategic plan for tourism, the Hawaii Visitor Bureau's tourism marketing plan, and the State tourism functional plan, recommendations for a revised state tourism plan to include the possible organizational and functional integration of the Hawaii Visitor's Bureau with the state tourism office, and a cost-benefit analysis of the state's expenditure during the past two fiscal years for the tourism program.

9. On or about July 17, 1988, Crosby was assigned the task of preparing project specifications for the State tourism project as it is defined in Section 247A quoted directly above. The project specifications

were to be prepared on or before July 25, 1988.

10. After having timely prepared the project specifications and having sent them to his immediate supervisor, Dennis Goda, hereinafter "Goda", Crosby was directed by Goda to prepare a request for proposal (RFP). The request for proposal included a procurement time table, general information concerning the project, the tourism management study specifications (which had already been prepared by Crosby), project responsibilities, proposal contents and several attachments. The purpose of the request for proposal was to inform potentially interested parties of the possibility of such a project being let to them, the specifications of the project and other relevant factors concerning the project, and to request interested parties to submit proposals containing a description

of how they would intend to perform the task and how much it would cost the State.

11. On or about September 7, 1988, Crosby sent a draft of the RFP to Goda.

12. After conducting extensive research erelating to tourism and program evaluations, and pursuant to HRS Chapter 103, the State's procurement code, Crosby recommended to his supervisor, Goda, that a competitive method of selection be used to select the consultant.

13. Crosby reasonably believed that HRS Chapter 103 required a competitive method or selection and that the public advertising and other requirements of Chapter 103 should be followed.

14. On September 10, 1988, Crosby sent to Goda a revised draft of the RFP.

15. On September 13, 1988, Goda returned the RFP to Crosby to finalize, and Crosby so finalized the RFP. Goda then sent

the RFP to Takemoto of the Department of Budget and Finance.

16. On September 20, 1988, Takemoto assigned the project to Deputy Director Robert Takushi, hereinafter "Takushi", to have BPM (Budget and Planning Division of the Department of Budget and Finance) issue the RFP under his supervision. Takemoto assigned the project to Takushi because of the importance of the project. Takemoto wanted to be able to keep an eye on it through Takushi.

17. The fact that Takemoto considered this project to be an important one was understood by Takushi, Goda, and the Plaintiff.

18. Thereafter, Takushi requested certain schedule revisions, and Crosby revised the RFP accordingly.

19. On November 1, 1988, Crosby forwarded Goda the revised RFP, together

with a memorandum of the same date attaching proposed advertisement for publication and a requisition for purchase of supplies and equipment form to authorize the advertisements. This memorandum in essence was Crosby's recommendation that the project go by way of bid, i.e., that it be advertised three times in the Honolulu Advertiser, pursuant to Section 103-22, H.R.S.

20. On November 3, 1988, Goda transmitted Crosby's memorandum and its attachments to Takushi, and recommended that Takushi approve the Plaintiff's recommendations contained therein including the recommendation to go by way of advertisement.

21. Takushi considered the recommendation of both Crosby and Goda and decided that the tourism project should proceed in a non-bid fashion.

22. Takushi's decision was based upon his understanding that the law does not require the tourism project to go by way of bid, but rather that the law allows the project to go non-bid.

23. Takushi refused to approve the recommendation of Goda regarding selecting the consultant pursuant to the requirements of Chapter 103.

24. Takushi informed Goda that the RFP would be sent only to the largest accounting firms and directed Goda to do so.

25. After having been so informed by Takushi, Goda informed Plaintiff on November 7, 1988, that Takushi's decision was that the project would go non-bid and that the RFP would be sent to large accounting firms. Believing that this was in violation of Chapter 103, Plaintiff declined the invitation to select the firms, and asked Goda to make the selection.

26. Goda chose eight firms to which the RFP would be sent from the Yellow Pages, and directed Crosby to send the RFP to those firms.

27. Because Takushi, in his earlier conversation with Goda, explained that he wanted the "big eight" accounting firms to receive the request for proposal, Plaintiff was requested to draft the letters to these "big eight" accounting firms, informing them of the RFP and including the same.

28. On November 10, 1922, Crosby wrote a memorandum to Goda transmitting the letters of invitation for the tourism program RFP, attaching a copy of the procurement time table for the RFP, and putting in writing his position, that Section 103-22, H.R.S., requires that bids for this project should be solicited through competition by means of advertisement. His basic position is that the project "lends

itself to competition" and he urged the director to take advantage of the benefits that "open competition" can bring to the selection process.

29. After having reviewed the November 10, 1988 memorandum referenced in the preceding paragraph, Goda responded on November 12, 1988, as follows:

> Although I agree with your reading of Section 103-22, H.R.S., it seems that DAGS, the agency responsible for the interpretation of Section 103-2, suggests that much of these contracts (if not all) do not lend itself to competition; therefore, exempt. Further, although we have recommended that the contract be put out to bid, we have been instructed to limit notice to "large accounting firms".

30. This notation of November 12, 1988 was understood by the Plaintiff to state in essence that the decision to go bid had been made by Goda's superiors, that the issue was no longer open for discussion and that Crosby should move to other aspects of the project so that the project can move on.

31. Prior to authoring the note of November 12, 1988, Goda had contacted the Department of Accounting and General Services, in order to determine whether in its opinion, the tourism project should go bid or non-bid, said department having been delegated by Governor Waihee and his predecessor the responsibility for implementing Section 103-22, H.R.S., including making the determination as to whether or not under that statute projects were required to go bid or non-bid.

32. Since the concern expressed by Plaintiff had been given serious

consideration and had received a consultation of an independent department of the State, Goda determined that there was no need to reconsider the issue.

33. On November 16, 1988, notwithstanding that the decision having already been made by Goda's supervisors, Crosby wrote a memorandum urging the Director to obtain an Attorney General's opinion on how Section 103-22, H.R.S., should be interpretated with respect to the solicitation for the tourism project RFP.

34. Prior to authoring the November 16, 1988 memorandum referenced above, Plaintiff called Deputy Attorney General Patricia Ohara, a deputy who had advised the Department of Budget and Finance on prior occasions. The Plaintiff and Ohara discussed the law in general with respect to the issue of when a project needs to be bid and when it is exempt from the bidding

requirement of Section 103-22, H.R.S. The discussion was general in nature, and did not include a discussion about the facts specific to the tourism project at issue in this case. Notwithstanding that, the Plaintiff understood from this general discussion that the Department of the Attorney General may give some support to his position that the law required the tourism project to be bid thereby prompting his sending the November 16, 1988 letter to Goda.

35. On November 16, 1988, Crosby sent a second memorandum to Goda and requested that the Director of Finance seek an Attorney General's opinion to determine the propriety of selecting the consultant without following the provisions of H.R.S. Chapter 103.

36. Goda thereafter again informed Crosby that the decision had been made to go

non-bid and therefore Goda reasonably determined that it was not necessary to forward the November 16th memorandum to his superiors.

37. Thereafter, Crosby continued to work on the project and coordinated an informational meeting attended by representatives of four of the eight accounting firms to which the RFP was sent.

38. In response to its RFP, the Department of Budget and Finance received proposals from Arthur Young and Company and Pete Marwick Main and Co., two national firms with Honolulu offices.

39. On January 10, 1989, Goda asked Crosby to evaluate the proposals.

40. On February 3, 1989, in response to Goda's request for the name of the consultant that Crosby preferred, Plaintiff told Goda that he believed that both proposals were not adequate, and that both

companies had apparent conflicts of interest since they had previously done consultant work for the Hawaii Visitors Bureau and effectively would be evaluating, in part, their own work.

41. At the time that Crosby made these points on February 3, 1989, he understood that if neither proposal succeeded, then he would have an increased opportunity to persuade his superiors that the project should go bid by way of advertisement.

42. On February 23, 1989, Goda informed Crosby that the Director had selected Pete Marwick Main and Co. as the contractor for the tourism project at issue, and further informed Crosby that he had contacted both the State Auditor and the State Board of Accountancy, discussed the conflict of interest issue raised by Crosby and had been advised by both that any conflict of interest problem could be

handled by either of the accounting firms that submitted the proposals, without disqualifying such firm. Goda explained that he was satisfied that the conflict of interest could be handled without disqualifying the firms involved.

43. Notwithstanding that the selection of the contractor had already been made by the Director of the Department and that Crosby had been so advised, Crosby authored the February 28, 1989 memorandum which argues the qualifications of the proposals and the conflict of interest issue, both of which had been given serious consideration by his superiors and decided by them, and which decision had been adequately conveyed to Crosby on February 23, 1989.

44. On February 23, 1989, during a meeting between Goda and Crosby, Crosby was requested to prepare a draft of the contract and to forward the same to Goda. The

February 28, 1989 memorandum referenced above attached a draft of the contract for review. The draft of the contract failed to include in it any language which would state a basis for why the contract was not being bid. Crosby was requested by Goda to forward the draft contract to the Attorney General's Office for its review, said review as to form being standard procedure.

45. On March 6, 1989, Deputy Attorney General Diana Erickson, hereinafter "Erickson", wrote a memorandum which was hand-delivered to Crosby, with her comments in pencil on the document itself and on yellow "post-its'.

The post-it note stated as follows:

> Do you have "sole source" approval? Or is this a "consultant's" contract? You do in parentheses state "consultant". If the former, you should add a recital ("whereas") to

the effect that sole source approval has been received. If the latter, you should add "whereas, the services to be provided are highly technical and professional and do not admit of competition". Is there any reason, e.g. legislative appropriation to B&F for this study, why B&F is the contracting agency?

46. Erickson's post-it note expressed her opinion that the contract should have the suggested language in it if the contract was a "sole source contract" or "consultant's contract".

47. In reviewing Erickson's memorandum and comments including the post-it note, Plaintiff concluded from his review of the post-it note that Erickson was independently questioning whether or not the tourism project should go bid under Section 103-22, H.R.S.

a. In fact, Erickson did not so question, but rather in her experience, reviewed the draft contract as to form and noted on the post-it note that the form of the contract should include a recital as to whether this is a sole source approval contract or a consultant's contract.

48. After reviewing Erickson's memorandum and her comments, Crosby arranged for an appointment with Erickson at the Department of the Attorney General. This meeting took place on March 8, 1989, during which Crosby explained the tourism project to Erickson and further explained why he believed the project was required by law to go by way of bid. Erickson during the meeting expressed her opinion that he had raised some legitimate points in a gray area, but stated that she would like to

discuss the matter with her supervisor. The issue was in the gray area, in Erickson's opinion, so checking with her supervisor was particularly appropriate.

49. On March 14, 1989, Erickson had a telephone conversation with Crosby, in which she explained the position of the Department of the Attorney General on the issue as to whether or not the tourism project in question was legally required to go by bid. She explained that the Department of the Attorney General's opinion was that there were two clearly recognized exceptions to the general requirement to go by way of bid, i.e., the sole source exception and the consultant's exception, and that based upon the facts pertaining the tourism project at issue, the Director of the Department of Budget and Finance had the discretion to conclude that the project was in fact exempted from the general requirement for

going bid and that the project in fact fell within one of the two exceptions described above.

50. Crosby disagreed with Erickson's explanation of the Department of the Attorney General's opinion, disagreed with the opinion expressed by the Department of Accounting and General Services as referenced above, disagreed with the position of his superiors at the Department of Budget and Finance and continued to be of the opinion that the tourism project was required under the law to go by way of bid, as required in Section 103-22, H.R.S.

51. As of March 14, 1989, instead of inserting the appropriate language as indicated by Erickson in her memorandum of March 6, 1989, Plaintiff declined to do so due to his concern that to do so would be to participate in "illegality".

52. Crosby left the draft agreement with Erickson's office on March 8, 1989, and did not receive the same back from Erickson's office until April 1, 1989. Plaintiff's Exhibit 12 is the March 6, 1989 memorandum from Erickson to Crosby, as edited by Erickson with the last paragraph added, and enclosing the draft agreement.

53. Because Crosby believed that sole source approval had not been obtained and believing that this was a consultant contract that did not admit of competition, Crosby believed that Erickson was advising him in her April 7, 1989 memorandum to falsify the documents in his files.

54. Crosby met with Erickson on April 11, 1989 to discuss her memorandum. Erickson told Crosby that the Attorney General has not issued any opinion that addresses the competitiveness for consultant contracts. Crosby advised Erickson that he

was leaving the language in the draft contract unchanged, and that he would forward her memorandum to Goda along with the draft contract.

55. Because he believed that Erickson was asking him to falsify documents in his files, Crosby returned the draft to Goda without the additions suggested by Erickson.

56. During the time from February 28, 1989 to April 7, 1989, Goda was under the impression that the contract was at the Department of the Attorney General for its review as to form. He did not know that Crosby had left it there due to the issue of whether or not the law required bidding for the tourism project. Concerned about the prolonged period of time to get approval as to form from the Attorney General's Office on the draft agreement, Goda tried to get Crosby to speed up the process to no-avail.

57. Erickson, through her comments and transmittals, never meant that Plaintiff should lie, conceal the truth, break the law, or manufacture documents.

58. After meeting with Crosby on April 11, 1989, Erickson went to Takushi's office and informed Takushi that Crosby had concerns over the method by which the project consultant was selected.

59. On April 12, 1989, Crosby forwarded to Goda the revised draft of the contract, dated April 11, 1989 which is Plaintiff's Exhibit 13. Crosby, along with the transmittal memorandum, also attached a copy of Erickson's memorandum sent to him on April 7, 1989 and requested that Goda note "that her remarks in her letter appear to address some aspects of the same topics I raised in my memorandum to you on November 10 and November 16, 1988".

60. In essence, Crosby's April 12, 1989 memorandum to Goda raised in written form once again, Crosby's arguments that the project should go bid.

61. When Goda reviewed the April 12, 1989 memorandum from Crosby, the draft agreement did not have the language in it recommended by Erickson to indicate that either the contract was sole source or consultant contract. The only reason given by Crosby as to why at this late date he refused to insert the advised language, was his opinion as to the legal requirements.

62. Crosby was not a lawyer nor did he have an expertise in government procurement contracts or in the interpretation of Section 103-22. Although his opinion on the legality of the non-bid approach to the tourist project was uninformed, without any expert basis and without any substantial personal experience of past practices,

Crosby doggedly held on to his belief that the law required the project to go by bid.

63. On or about April 14, 1989, Erickson met with Takushi at Takushi's office to discuss a number of issues. during this meeting, Erickson advised Takushi that Crosby still had concerns regarding the bid/non-bid issue, even after she had explained to him the Department of Attorney General's position. Takushi asked Erickson whether or not there was an exception to the bid requirement that the tourism project could fall into, and Erickson explained that there was. That satisfied Takushi that his prior understanding that the project could go non-bid was in fact legally correct.

64. After his meeting with Erickson, Takushi went to Goda to discuss Crosby's concerns. Takushi believed that the project was getting bogged down and was being delayed by Crosby's concerns, that Crosby

was losing his objectivity because of his concerns, and felt that there was "bad blood" between Goda and Crosby on the basis of a discussion that he held with Crosby three years earlier.

65. Up to April 18, 1989, the State of hawaii, though its designated representative, could not identify any delays whatsoever that Crosby caused to the project. The State of Hawaii, through its designated representative, testified that it was Crosby's obligation to raise his concerns concerning the method of selecting the contractor and apparent conflicts of interest with his supervisors. From the time period July 1988 - April 18, 1989, Crosby was never informed, in writing or otherwise, that his actions were delaying the project.

66. On April 18, 1989, Takushi met with Goda concerning a request made by

Crosby that he be allowed to attend a seminar on the tourism industry. His attendance on the tourism industry seminar would be based solely upon his continued involvement on the tourism project. If he were no longer involved in the tourism project, there would be no business reason to attend the seminar.

67. They discussed the concerns raised by Crosby, including the conflict of interest and the methods by which the consultants were selected.

68. When Goda explained to Takushi that Crosby kept raising concerns which Goda thought he had addressed, Takushi felt a general concern that things were not moving on the project and that the project was getting bogged down.

69. Though Takushi believed that Crosby truly felt that he was justified in

raising the issues, Takushi felt that this resulted in the project being bogged down.

70. Takushi decided to remove the project from Crosby because the project was bogged down, not moving forward, because Goda showed his frustrations in dealing with Crosby's concerns, and because Plaintiff appeared to be losing his objectivity.

71. Crosby's manner of stating his concerns to his superiors was not disruptive to the operations of the Department of Budget and Finance.

72. Takushi was not aware that the director had failed to select a contractor until February 23, 1989, more than five weeks after the January 20, 1989 selection deadline.

73. Takushi was not aware that Erickson was in possession of the draft contract from March 8, 1989 to April 7, 1989.

74. The personnel decision to reassign the tourism project from Crosby to another RASA was based on Takushi's concern that the project move forward, and his sense that the Department would function more efficiently if he was able to unhook the particular project from the Plaintiff.

75. At his meeting with Goda, Takushi instructed Goda to remove Crosby from the project, although Goda had previously testified Crosby's removal was a joint decision.

76. The only action taken by Takushi was to reassign the project. Plaintiff was not fired, demoted or put on leave without pay. No disciplinary action was taken against Plaintiff. The decision by Takushi was not made in retaliation for any prior act or expression by Crosby. It was not in retaliation for his expression of any First Amendment Rights nor is it in retaliation

for any discussion between Crosby and any Deputy Attorney General or other person.

77. On April 18, 1989, Crosby was contacted by Al Chun, hereinafter "Chun", a management analyst in the Department of Budget and Finance. Chun told Crosby that he would be finishing the project and had been assigned to the project to replace Crosby. Chun was told by Goda that Crosby was busy on other projects.

78. After his conversation with Chun, Crosby met with Goda, who stated that Takushi had directed him to remove Crosby from the project.

79. On April 19, 1989, Chun redrafted the contract to include language that indicated that it was a contract that did not admit of competition. He testified that Erickson approved the change.

80. Erickson testified that if sole source approval or consultant contract

approval was not obtained or pending, it would not be appropriate to include that language in the contract. As of April 19, 1989, Takushi testified that neither sole source approval nor consultant contract approval had been obtained nor was it pending, although Takushi testified that it was his intention to obtain these approvals.

81. On April 19, 1989, the revised contract was sent to Peat Marwick Main for their signature. The letter was signed by Takushi for Takemoto.

82. Takushi testified that he believed the contract selection method was proper and on that basis he forwarded the contract to Peat Marwick Main.

83. No evidence was presented to show that Plaintiff suffered any actual damages.

84. No evidence was presented to show that "further retribution" is likely.

85. Sometime after the contract had been sent to Peat Marwick Main and Co., Takushi had a conversation with Dale Saito, a partner at Peat Marwick Main and told him that a complaint was filed or about to be filed.

86. Takushi did not have concerns over the legality of the contractor selection process.

87. In September 1989 Goda asked Chun to do a comparison between the proposed tourism project and the tourism study done by the Legislative Auditor.

88. Chun's comparison showed that the two studies were very similar.

89. Based on Chun's comparison, Takemoto decided not to proceed with the Department of Budget and Finance's tourism study because he felt it was not in the best interest to the State to have two government

agencies doing the same thing, thereby cancelling the study.

90. Plaintiff was never forbidden to speak out about his concerns.

91. The Comptroller has not promulgated any rules or regulations to implement Section 103-22, H.R.S.

92. The Comptroller in 1987 requested appropriation from the Legislature in order to fund a study of the State of Hawaii's purchasing laws, policies, practices and alternatives. The Legislature subsequently appropriated monies for the study, and the study was performed by Lallatin and Associates.

93. This study of the State's purchasing laws, policies, practices and alternatives, was requested by the copmptroller because of his experience in 1986 that led him to believe that there were problems in the State system that needed to

is classically the type of a discretionary decision best left to the Executive Department.

96. Circular 1977-3 is simply a guideline by the Department of Accounting and General Services to the other department heads in the State of Hawaii, as to how the Department of Accounting and General Services interprets Section 103-22, H.R.S., insofar as the sole source issue is concerned. Circular 1977-3 does not bind any member of the public nor any public employee with respect to any substantive right that may be inferred under Section 103-22, H.R.S. Rather, it is simply an internal guideline that the Comptroller may ignore or not. Further, the Governor may also ignore it.

97. Furthermore, the Court is not of the opinion that this is the appropriate case in which to enjoin the Comptroller to

promulgate rules and regulations, even if the Court had the power to do so. Therefore, the Court declines to do so.

CONCLUSIONS OF LAW

1. The Court has the jurisdiction over the parties and the subject matter in this action.

2. The State of Hawaii did not discriminate against Crosby regarding compensation, terms, conditions, location or privilege of employment as those terms are used in Section 378-22, H.R.S.

3. Further, there was no causal nexus between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project at issue.

4. The reassignment of the tourism project at issue was within the legal rights of the employer pursuant to Section 89-9, H.R.S.

5. The State of Hawaii did not violate the Whistle Blower's Protection Act, Chapter 378, H.R.S.

6. The State of Hawaii did not violate Plaintiff's freedom of speech as guaranteed either by the Federal Constitution or the State Constitution.

7. Circular 1977-3 is not a rule or regulation, but is merely a guideline and is not subject to the provisions of the Administrative Procedures Act, Chapter 91, H.R.S.

8. The Judiciary may not encroach upon the Executive function. The courts have no power to interfere with the performance of Executive duties where the Executive must exercise discretion in the performance of statutory powers. H.R.T. v. Territory, 211 U.S. 282. H.R.S. Section 101-33.

9. Hawaii Revised Statutes, Section 101-33 gives the Comptroller the discretion to promulgate rules and regulations, not the duty to do so. The Comptroller may not therefore be subject to an injunction which requests that the Court order the Comptroller to promulgate rules and regulations.

13. Plaintiff is not entitled to injunctive relief as to further retribution because Plaintiff failed to present any evidence that "further retribution" is likely.

DATED: Honolulu, Hawaii March 4, 1992.

JUDGE OF THE ABOVE-ENTITLED COURT

NO. 16064

IN THE SUPREME COURT OF THE STATE OF HAWAII

PETER A. CROSBY, Plaintiff-Appellant, vs. STATE OF HAWAII; STATE OF HAWAII DEPARTMENT OF BUDGET & FINANCE; STATE OF HAWAII DEPARTMENT OF ACCOUNTING & GENERAL SERVICES; YUKIO TAKEMOTO, Director of State Hawaii Department of Budget & Finance; RUSSELL NAGATA, State Comptroller; DOES 1-50, inclusive, Defendants-Appellees	CIVIL NO. 89-2152-07 APPEAL FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED MARCH 5, 1992 AND JUDGMENT FILED MARCH 18, 1992 FIRST CIRCUIT COURT HONORABLE SIMEON ACOBA, JR. HONORABLE PHILIP T. CHUN HONORABLE PATRICK K.S.L. YIM Judges

NOTICE AND JUDGMENT ON APPEAL
and
CERTIFICATE OF SERVICE

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NOTICE AND JUDGMENT ON APPEAL

TO THE HONORABLE Presiding Judge of the Circuit Court of the First Circuit:

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the opinion of the Supreme Court entered on July 18, 1994 the Judgment of the Circuit Court of the First Circuit entered on March 18, 1992 is affirmed.

DATED: Honolulu, Hawaii, Aug 4, 1994.

BY THE COURT:

_____
Clerk

APPROVED:

Robert G. Klein (Supreme Court Seal)
JUSTICE

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND
GENERAL SERVICES
HONOLULU, HAWAII

December 22, 1977

CIRCULAR - 1977-3

TO: All Department Heads

FROM: State Comptroller

SUBJECT: "Sole Source" Purchase

All purchasing and contracting personnel should be thorough familiar with Chapter 103, H.R.S., as it contains the basic statutory requirements imposed on purchasing activities. This memorandum is intended to provide guidelines concerning the principle exception -- "sole source" purchases -- to the bidding requirement of Section 103-22, H.R.S. Each department head is asked to see that this memo is disseminated to all departmental staff members concerned with purchasing and contracting:

Very briefly, the following is a summary of Section 103-22:

(1) All expenditures in excess of $4,000 must be advertised for public bid.

(2) The following exceptions are provided:

(a) Salaries of pay of officers or employees;

(b) Permanent settlements, subsidies, or other claims or objects for which a fixed sum must be paid by law;

(c) Other purposes which do not admit of competition;

(d) Purchases from the federal, the state, county or municipal governments, or agencies thereof; and

(e) Performance of public works by any agency of the federal, state, county or municipal government.

The most common problem related to 103-22 is that invoices in excess of $4,000 are vouchered for payment, but the transaction had not been advertised as required.

In the case of the purchase of commodities, equipment or services, the principle valid reason for not advertising is that the purchase is for a "purpose which does not admit of competition". Purposes which do not admit of competition have the following essentials:

(1) A unique feature, characteristic or capability is essential in order for the agency to accomplish its work;

(2) A particular commodity, equipment or service has the unique feature characteristic or capability required;

(3) The particular commodity, equipment or service having the unique feature, characteristic or capability is available from only one supplier or contractor.

In the event only one brand can provide the essential unique feature, characteristic, or capability, the purchase may be considered "restrictive" rather than "sole source". In this event, the purchase may still be competitive since the brand may be available from more than one supplier and a bid may call for only that brand. Only if such a brand is available from but one supplier could it be considered "sole source".

If a department determines that a prospective purchase does not admit of competition because it must be acquired from a "sole source", it should submit to the Comptroller, prior to making any purchase commitment, a written request for concurrence with the department's purchasing requirement and the rationale on which the determination was based. The request should also provide as much detail as possible to make it absolutely clear that the purpose is one that does not admit of competition because of the "sole source" circumstances. Request that are found lacking in sufficient explanation will be rejected.

To assure conformity with statutory requirements, the procedure covered in this memorandum must be closely follows; under no circumstances should a purchase obligation be made by a department on a "sole source" basis prior to obtaining the Comptroller's written concurrence as provided in this

memorandum. All departments are reminded that Section 40-39, H.R.S., provides the Comptroller with effective recourse in the event obligations are incurred or expenditures are made contrary to the requirements of Chapter 103.

Anyone requiring explanations or interpretations of Chapter 103 is invited to contact the Purchasing and Supply Division by telephoning 548-4057.

HIDEO MURAKAMI
State Comptroller

Supreme Court, U.S.
FILED
DEC 2 1994
OFFICE OF THE CLERK

No. 94-824

In The

Supreme Court of the United States

October Term, 1994

PETER A. CROSBY,

Petitioner,

v.

STATE OF HAWAII, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

There is a substantial jurisdictional defect with respect to the instant Petition, in that the Petition was filed more than ninety days after issuance of the opinion of the Supreme Court of Hawaii, which constitutes the "judgment" for purposes of this Court's Rule 13.4. Petitioner's filing of the Petition within ninety days of the entry of the state court "Notice and Judgment on Appeal," Pet. App. C, is untimely, because that document is merely "the mandate (or its equivalent under local practice.)" S. Ct. R. 13.4. This defect, as well as the impact of the Eleventh Amendment, and the mootness of Plaintiff's claim for equitable relief, are discussed *infra* pp. 5-8.

STATEMENT OF THE CASE

The facts pertinent to this Petition are found in the trial court's findings of fact and conclusions of law. Pet. App. B. For purposes of this Court's preliminary review, the following are the most pertinent of the factual findings made below.

1. Hawaii law, at the times relevant to this proceeding, allowed public contracts to be let on a noncompetitive basis when the purposes thereof "do not admit of competition," or if the contract called for consultant services. Pet. App. A at 12-13 & n.4 (citing Haw. Rev. Stat. §§ 103-22, 103-32 (1985)). As a general matter, decisions whether particular contracts fell into one or both of these exceptions were unreviewable judicially and were committed to state agency discretion.

2. In 1988-89, Petitioner, then a resource allocation systems analyst in the Department of Budget and Finance of the State of Hawaii, not only voiced concerns that a particular contract for a "comprehensive management study of the state's tourism program" be competitively bid, but engaged in a systematic set of actions which had the effect of obstructing the orders of his superiors, backed by opinions by the Department of the Attorney General, that had concluded that the contract could be let noncompetitively. These actions consisted of failing to process an invitation to selected firms only (Pet. App. B at 10), preparing added memoranda during his working hours refuting his superiors' reasoning (*id.* at 11), writing further memoranda, at state expense, questioning the independent determination of the Department of Accounting and General Services, which performs functions analogous to the General Services Administration in

the federal government (*id.* at 14), expending additional state resources raising specious conflict-of-interest challenges to those who sought to contract with the State (*id.* at 17-18), defying the recommendations of the Department of the Attorney General designed to resolve any legal issue concerning whether discretion had been properly exercised (*id.* at 22-23), and otherwise taking action, at cost to the taxpayers, to frustrate his superiors' orders even though "his opinion on the legality of the non-bid approach to the tourist project was uninformed, without any expert basis and without any substantial personal experience of past practices" (*id.* at 27-28). Although the trial court did not expressly find that Petitioner was *informed* that "his actions were delaying the project," Petitioner was ultimately removed from "the project" because of "a general concern that things were not moving on the project and that the project was getting bogged down" (*id.* at 30). Petitioner, as the trial court found, was thus removed from the tourism contract project out of the Budget Director's "concern that the project move forward, and his sense that the Department would function more efficiently if he was able to unhook the particular project from the Plaintiff" (*id.* at 32). "Plaintiff was not fired, demoted or put on leave without pay," and "[n]o evidence was presented to show that Plaintiff suffered any actual damages" (*id.* at 34). In the end, the project was abandoned when the Department of Budget and Finance learned that another state agency had conducted a study similar to that which was the subject of the proposal. (Pet. App. A at 18).

3. Petitioner's claim that the reassignment of the tourism project violated his First Amendment rights was rejected in the state courts, after a full trial. The trial court

found that "there was no causal nexus between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project at issue." Pet. App. B at 39. The Supreme Court of Hawaii affirmed, relying on the important distinction "between Crosby's expression and his conduct related to that expression." Pet. App. A at 37. Because, as the trial court found, "it was not the fact that Crosby expressed his disapproval of [Budget Director] Takushi's decision to employ a non-bid method of selection that prompted Takushi to remove Crosby from the project, but, rather, that Takushi's response was provoked by the delay and incompletion of the project and the 'bad blood' occasioned by Crosby's consistent refusal to accept Takushi's final decision *after* Crosby had surfaced his opinions," *id.* at 41, Crosby had no legal basis to challenge the trial court's judgment. In an alternative holding, the state court concluded that Crosby could still have been removed from the project "[e]ven were we to assume that Crosby's protected conduct was a motivating factor in the State's decision to remove *him*." *Id.* at 44. Given the minimal burden imposed on Crosby, and the State's paramount interest in efficient deployment of its scarce resources, the Petitioner had no valid right to relief under the Constitution.

REASONS FOR DENYING THE WRIT

1. This Court does not have jurisdiction over this case because the Petition was not timely filed. Supreme Court Rule 13.4 states that "[t]he time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent

under local practice)." Under Hawaii law, the "notice and judgment on appeal" serves no function *other* than as "a mandate," *see* Haw. R. App. P. 41(b), and its entry is simply a ministerial task assigned initially to the prevailing attorney (who prepares it) and then a single Justice, who approves it as to form. *See* Pet. App. C. This Court's jurisdiction to entertain a Petition for Certiorari is not impeded by the delay in the entry of the "notice and judgment on appeal," and for this reason the Court does not have jurisdiction to hear this Petition. The time in which to file the Petition in this case commenced on July 18, 1994, and expired on October 16, 1994, well before the Petition was filed.

2. The Court would not likely reach the issues raised by the Petition, even if they were otherwise worthy of review, because there is palpably no "case or controversy" with respect to any prayer for equitable relief, and Petitioner's claims for damages are all barred by *Will v. Michigan*, 491 U.S. 58 (1989), and by the doctrine of qualified officer's immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In any event, Petitioner did not prove a single penny of damages, and he could not obtain an attorneys fee award based even on a prayer for nominal damages (which prayer he did not preserve). *See Farrar v. Hobby*, 113 S. Ct. 566 (1993). This case is thus unworthy of review.

3. The Supreme Court of Hawaii was unquestionably correct in rejecting Crosby's First Amendment challenge to the judgment.

a. The First Amendment plainly does not protect Crosby's Obstructive conduct, even if his speech was protected in *some* fashion by federal law. Crosby did far

more than simply voice his opinion. He expended not only substantial quantities of the state's resources, after implicit, and then express, orders to the contrary from his superiors, leading to the situation, at a minimum, where the Budget Director reasonably gained the impression that Crosby was responsible for blocking, delaying, and otherwise "bogging down" the award of the contract. Even if Crosby believed he was right – even if Crosby *was* right – that the contract ought not to have been let noncompetitively, he did not have authority to take the matter into his own hands. Had Crosby, on his own personal time, and supported by his own funds, written to the newspapers, given television interviews, or complained to the Legislature, this case might present more significant questions. But unless the state's ability to function is to be totally frustrated, Crosby's actions cannot amount to protected conduct. *See Waters v. Churchill*, 114 S. Ct. 1878, 1886-1889 (1994); *Connick v. Meyers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968).

b. Crosby's contention that the Supreme Court of Hawaii wrongly assigned the burden of proof to the State is meritless. A claim of wrongful retaliation under the First Amendment, as in cases of race discrimination under the Fourteenth Amendment, turns on federally questionable motive, at least at the threshhold. *Compare St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993) (burden of persuasion always remains with the plaintiff), *with Waters*, 114 S. Ct. at 1888 (employee may be dismissed solely because of the employer's view "that a quieter subordinate would allow them to do this job more effectively"). In this case, Crosby had a full trial, and was not able to show, as a factual matter, that any

protected *speech* was the cause of his reassignment from the project to award the tourism contract.

c. The Supreme Court of Hawaii also found correctly that, in the alternative, Crosby could legitimately be removed from the project even if his "protected" speech was a partial motivation for the action. Although there is nothing in the record that warrants the Court even reaching this alternative conclusion, not a single decision of this Court either holds or suggests that a mere task reassignment constitutes a sufficient "burden" on First Amendment rights as to even warrant federal scrutiny of any kind. *Cf. Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450-51 (1988) ("incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification.") Even if Budget Director Takushi was mistaken in his assessment of who was to blame for the project's delays, there is nothing in the record to indicate that the mistake was so "unreasonable" as to warrant deployment of this Court's scarce resources. Indeed, given the recency of this Court's *Waters* decision, Petitioner obviously cannot point to any conflict in the appellate courts that warrants this Court's corrective action or guidance at this time. The Hawaii Supreme Court, without prompting of the parties, took pains to analyze the record in light of *Waters v. Churchill, supra*, and there is no basis for further review or a summary remand here.

CONCLUSION

For the reasons above, the Petition should be denied.

Dated: Honolulu, Hawaii, December 2, 1994.

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(3)

NO. 94-824

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PETER A. CROSBY,

Petitioner,

v.

STATE OF HAWAII, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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Petitioner Peter Crosby submits his Reply Brief in Support of his Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii.

I. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED AND THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

This petition for writ of certiorari was timely filed within ninety days of the entry of judgment by the Hawaii Supreme Court. Supreme Court Rule 13.4. Respondents wrongfully contend that this Court lacks jurisdiction over this appeal because the Petition was allegedly not timely filed. Respondents' Brief in Opposition at 4-5. In making this argument, Respondents have misled this Court by failing to research (and cite) two cases which resolve this issue: Puget Sound Company v. King County, 264 U.S. 22 (1923) and McCarthy v. Jaress, 6 Hawaii Appeals 143, 711 P.2d 1315 (1985).

In Puget Sound Company, respondents contended that petitioners had not filed their appeal from the Washington

Supreme Court within the time allowed by law. 264 U.S. at 23. The Washington Supreme Court entered its opinion on June 12, 1922 and filed its judgment on July 10, 1922. Petitioners filed their petition for writ of certiorari on September 22, 1922, within the ninety-day period for filing a writ starting on July 10, 1922, but beyond the ninety-day period for filing a writ starting on June 12, 1922. Id. at 24.

This Court rejected respondents' suggestion that petition was untimely filed on the basis that

> Under the law of Washington . . . a decision of a department of the Supreme Court does not become final until thirty days after it is filed, during which a petition for rehearing may be filed . . . [I]n all cases where the decision is final, there is a specific provision that a judgment shall issue thereon. It is apparent that however final the decision may be, it is not the judgment.

Id. at 24 (emphasis added).

The critical question for this Court is thus whether the opinion of the Hawaii Supreme Court or its subsequently entered judgment "is the judicial determination or sentence of

the court upon a matter within its jurisdiction." United States v. Hark, 320 U.S. 531, 554 (1943). This issue has been resolved by the Hawaii courts in McCarthy v. Jaress, 6 Hawaii Appeals 143, 711 P.2d 1315 (1985).

In McCarthy, appellees contended that appellate jurisdiction was terminated upon the filing of the appellate court's opinion. 6 Hawaii Appeals at 146, 711 P.2d at 1318. The Hawaii Intermediate Court of Appeals rejected that argument and ruled that under Hawaii Rules of Appellate Procedure 36 and 41, the appellate court's jurisdiction over the merits of the case terminates upon the filing of the appellate court's judgment and not its opinion. Id. at 146, 711 P.2d at 1318.

The Intermediate Court of Appeals went on to place the jurisdictional question raised by Respondents squarely within the rule set out in Puget Sound Company. Under the Hawaii Rules of Civil Procedure, the filing of the opinion is the starting date used to file a motion for reconsideration (similar

to the petition for rehearing under the Washington statute cited in Puget Sound Company). A motion for reconsideration cannot be filed after the Hawaii appellate court's judgment is filed. "In other words, the judgment is the final act with respect to the merits of the case on appeal." Id. at 146 n.5, 711 P.2d at 1318 n.5 (emphasis added). This unequivocal pronouncement of the Hawaii courts clearly refutes Respondents' contention that the judgment under Hawaii appellate practice is merely a ministerial task. Respondents' Brief in Opposition at 5.

As shown above, the petition for writ of certiorari was timely filed and this Court has jurisdiction to hear this appeal.

II. PETITIONER DID NOT OBSTRUCT OR DISRUPT GOVERNMENT OPERATIONS

Respondents next argued that Peter Crosby's conduct as distinguished from his speech should not be protected because it was obstructive and disruptive of government operations. Respondents' Brief in opposition at 5-6. All of Crosby's

"conduct" was expressive of his spoken and written beliefs that the project was being let illegally and was burdened with conflicts of interest. Specifically, Crosby declined the invitation by Goda to personally select the firms that would receive the Request for Proposal (Finding of Fact 25, Appendix B at 10), and he would not on his own volition insert language in the contract which stated: "Whereas, the services to be provided . . . do not admit of competition" (Finding of Fact 51, Appendix B at 23). The whole record shows that no orders were ever disobeyed by Crosby, and that his speech and conduct were motivated solely by his attempts to uphold the law.

In contrast to Respondents' unsubstantiated allegations, the trial court's Findings of Fact state that not only was Mr. Crosby's conduct not disruptive, it was his obligation to raise the concerns that he did. Specifically, Findings of Fact 71 and 65 state that:

> 71. Crosby's manner of stating his concerns to his superiors was not disruptive to the operations of the Department of Budget and Finance.
>
> ***
>
> 65. Up to April 18, 1989, the State of Hawaii, through its designated representative, could not identify any delays whatsoever that Crosby caused to the project. **The State of Hawaii, through its designated representative, testified that it was Crosby's obligation to raise his concerns concerning the method of selecting the contractor and apparent conflicts of interest with his supervisors.** From the time period July 1988 -- April 18, 1989, Crosby was never informed, in writing or otherwise, that his actions were delaying the project.

Petitioner's Appendix B at 31, 29 (Finding of Facts 71, Finding of Fact 65) (emphasis added).

The State's unsubstantiated factual allegations highlight that Peter Crosby was placed in the path of an illegal action taken by his superiors and that he acted reasonably in attempting to comply with his legal obligations in a process that was effectively fraudulent. Respondents' arguments ignore that Mr. Crosby was specifically acting within the law in attempting to obtain a written opinion of the Attorney General,

which may only be requested by the governor, the legislature, or its members, or by the head of a State department under Hawaii law. Hawaii Revised Statute § 28-3. Trial Exhibit 8: November 16, 1988 memorandum from Peter Crosby to Dennis Goda. [1]

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[1] Incredibly, the State argues that Peter Crosby might be entitled to constitutional protection if he was more disruptive and had gone "to the newspapers [or] given television interviews," Respondents' Brief in Opposition at 6. However, private speech is entitled to just as much protection as public speech:

> We are unable to agree that private expression of one's views is beyond constitutional protection, and therefore reverse the Court of Appeals' judgment and remand the case so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment.
>
> This Court's decisions in *Pickering*, *Perry* and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely

III. MT. HEALTHY REQUIRES THE STATE TO MEET ITS BURDEN TO SHOW THAT IT WOULD HAVE REMOVED CROSBY FROM THE PROJECT ABSENT HIS PROTECTED SPEECH

Respondents next argue that under applicable case law, the State does not bear the burden to show that it would have taken the same action even in the absence of Crosby's protected speech. Respondents' Brief in Opposition at 6-7. However, Respondents' unfounded legal contentions totally ignore this Court's pronouncements in Mt. Healthy v. Doyle, 429 U.S. 274 (1977). Mt. Healthy specifically provides that:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" -- or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have

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coincidental fact.

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 413-414 (1978).

> reached the same decision as to respondent's re-employment even in the absence of the protected conduct. [footnotes omitted]

429 U.S. at 287. Respondents simply are wrong on the applicable legal standards which the Hawaii Supreme Court should have applied to this case.

IV. EVEN THE "MINIMAL" BURDEN OF REMOVAL FROM THE PROJECT IS AN ADVERSE DISCIPLINARY ACTION WHICH IS PROTECTED UNDER THE FIRST AMENDMENT

Respondents next argue that because Mr. Crosby was merely removed from the project as opposed to being fired, the State did not engage in conduct which is prohibited by the First Amendment. Respondents' Brief in Opposition at 7. The State's position that

> Not a single decision of this Court either holds or suggests that a mere task reassignment constitutes sufficient 'burden' on First Amendment rights.

is duplicitous. Respondents' Brief in Opposition at 7. Numerous cases have held that it is the act of retaliation, in any context, that imposes the chilling effect on a public

employee's First Amendment rights. These cases have shown that any sanction imposed, even a sanction short of dismissal, is violative of the First Amendment and that First Amendment protection is proper. As this Court recognized in NAACP v. Button, 371 U.S. 415, 433 (1962):

> The threat of sanctions may deter [First Amendment freedoms] almost as potently as the actual application of sanctions.

See also, Rankin v. McPherson, 483 U.S. 378, 384 (1986) and Pickering v. Board of Education, 391 U.S. 563, 574 (1967).

Numerous lower courts have relied on these decisions to verify that actions short of dismissal and where there is no loss of monetary benefits may not be taken to impose a chilling effect on a person's right to free speech. E.g., Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1159-60 (6th Cir. 1980) (letter of reprimand placed in personnel file has chilling effect); Allaire v. Rodgers, 658 F.2d 1055, 1058 Note 2 (5th Cir. 1981) (listing cases which hold that alteration of employment conditions short of

termination in retaliation for protected speech is not permissible); Knapp v. Whitaker, 757 F.2d 827, 843 (7th Cir. 1985) (negative evaluation in teacher's personnel file expunged); Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977) (unwanted transfer constitutes loss of a valuable government benefit); Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) (campaign of harassment for exercising First Amendment rights constitutes chilling effect); Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir. 1987) (threat to transfer is chill on protected speech); Zamboni v. Standler, 847 F.2d 73 (3rd Cir. 1988) ("any action" in retaliation for protected speech could include de facto demotion when transferred, suspension without pay or other minor actions); Anderson v. Central Point School District, 746 F.2d 505, 508 (9th Cir. 1984) (loss of salary not necessary as element of damage for First Amendment violation); and Levin v. Harleston, 966 F.2d 85 (2nd Cir.

1992) (chilling effect on speech by creation of investigation committee and "shadow" section of philosophy course).

V. THE STATE'S ACTIONS IN INVESTIGATING CROSBY'S PERFORMANCE WERE NOT REASONABLE

Respondents last argue that Takushi's actions were reasonable under this Court's recent decision in Waters v. Churchill, 114 S.C. 1878 (1994). The Hawaii Supreme Court, however, never looked into the reasonableness of how Takushi formed his beliefs since,

> As indicated previously, the facts are not disputed in the instant case, so we need not decide whether the State's investigation met the Waters plurality's 'reasonableness test'.

Crosby v. State, 76 Hawaii 332, 341, n. 12, 876 P.2d 1300, 1309, n. 12 (1994), Appendix A at 27.

Nonetheless, the whole record clearly shows that there was no reasonable investigation by Takushi after he was informed by Erickson on April 11, 1989, of Crosby's concerns. For example, Takushi testified he had not seen Crosby's memoranda to Goda relating to the contractor

selection process and to the conflicts of interest until these were shown to him at his deposition. T. 12/5/90, 115-4 through 116-13. Further, Takushi was not aware that Erickson had possession of the draft contract for over one month, and that there was a one-month delay by the Director's office in selecting the project consultant. T 12/5/90, 148-4 through 148-15. Also, Takushi never spoke directly with Peter Crosby before discharging him from the project. Findings of Fact 77 and 78; T 12/4/90, 45-9 through 45-15; T. 12/5/90, 19-19 through 19-25; 20-5 through 20-8.

Takushi instead relied upon a conversation that he had with Crosby that was three years old and which did not relate to the tourism project as the basis for his belief that there was "bad blood" between Goda and Crosby. Finding of Fact 64; T. 12/5/90, 142-1 through 143-2. Similarly, there is no basis in the State's contention that Takushi "reasonably gained the impression that Crosby was responsible for blocking, delaying, and otherwise 'bogging down' the award of the contract."

Respondents' Brief in Opposition at 6. In fact, the trial court found just the opposite:

> 65. Up to April 18, 1989, the State of Hawaii; through its representative, could not identify any delays whatsoever that Crosby caused to the project . . . "

Petitioner's Appendix B at 29 (Finding of Fact 65). [2] Clearly, there was no reasonable investigation by the State in this case.

---

[2] As further evidence of the State's total lack of understanding and investigation into its own actions, the State changed its position five days before the trial relating to whether the project should have been competitively bid or not. In Exhibit 1, the State responded that "the project does lend itself to competition." Defendant State of Hawaii's Answers to Plaintiff's First Request for Answers to Interrogatories to Defendant State of Hawaii, Interrogatory No. 3. On the eve of trial (apparently knowing it could not justify its position), the State amended its interrogatory responses and contended that the project "does not lend itself to competition." Exhibit E: State of Hawaii's Amended Response to Plaintiff's First Request for Answers to Interrogatories, Interrogatory No. 3.

VI. CONCLUSION

In conclusion, for the reasons set forth above and in Plaintiff's Petition for Writ of Certiorari, the Petition should be granted.

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